The University of the State of New York

The State Education Department
State Review Officer
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No. 12-016

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Southold Union Free School District

Appearances:
Law Office of Andrew K. Cuddy, attorneys for petitioner, Andrew K. Cuddy, Esq., and Jason H. Sterne, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, Christopher Venator, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) reimburse her for the costs of her daughter's tuition at the Landmark School (Landmark) for the 2009-10 and 2010-11 school years. For reasons discussed more fully below, the appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross- appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).[1] In this case, the dispute between the parties ultimately arises from the district's

[1] The student's prior educational history has been discussed at length in previous appeals and will not be repeated here (see Dist. Exs. 66 at pp. 1-31 [referring to Application of a Student with a Disability, Appeal No. 09-088, which determined that the district offered the student a free appropriate public education (FAPE) for the 2007-08 school year; denying tuition reimbursement for the 2008-09 school year because Landmark was not appropriate to meet the student's special education needs due to Landmark's overly restrictive setting; and finding that the student was not entitled to receive extended school year (ESY) services for summer 2008]; 65 at pp. 1-31 [referring to the IHO's decision regarding the 2007-08 and 2008-09 school years]; 64 at pp. 1-14 [referring to Application of the Bd. of Educ., Appeal No. 07-135, which determined that the student was not eligible to receive

recommendations to place the student in a public school placement for the 2009-10 and 2010-11 school years. Prior to the start of the 2009-10 school year, the CSE convened on May 7 and June 5, 2009, to conduct the student's annual review and to develop her IEP for 10th grade (Dist. Exs. 8 at p. 1; 9 at p. 1; 60 at pp. 1-4; see Parent Ex. EEEEE at pp. 1-35 [providing a written transcript of the June 5, 2009 CSE meeting]).[2, 3] Relying primarily upon information obtained from the student's most recent progress reports from Landmark, dated April 2009, and from the information provided by the Landmark teachers participating in the May and June 2009 CSE meetings, the CSE recommended placing the student in an 8:1 inclusion program for English, mathematics, social studies, science, and science lab; and for the student to receive a daily 1:1 tutorial for the 2009-10 school year (Dist. Exs. 9 at pp. 1-2, 8; 23 at pp. 1-2; 24 at pp. 1-10; Parent Ex. EEEEE at p. 33; see Tr. pp. 1185-90; compare Dist. Ex. 9 at pp. 1-2, with Dist. Ex. 9 at p. 8 [identifying the inclusion program for the student's core academic courses on the IEP as "Consultant Teacher Direct" services in an "Integrated" setting]).[4] According to the IEP, the CSE recommended that

ESY services for summer 2007]; 63 at pp. 1-14 [referring to Application of a Child with a Disability, Appeal No. 07-119, which determined that the district offered the student a FAPE for the 2006-07 school year]; 61 at pp. 1-11 [referring to Application of a Child with a Disability, Appeal No. 04-082, which determined, in part, that the district offered the student a FAPE for the 2003-04 school year and that the student was not eligible to receive ESY services for summer 2003]; see also Dist. Ex. 62 at pp. 1-4 [referring to Application of a Child with a Disability, Appeal No. 07-095, which determined that the student was not entitled to pendency services at Landmark during summer 2007]). During the course of this administrative due process proceeding, the U.S. District Court for the Eastern District of New York found in favor of the district upon judicial review of Application of a Student with a Disability, Appeal No. 09-088 (D.D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040 [E.D.N.Y. Sept. 2, 2011]). The parent also sought judicial review of Application of the Bd. of Educ., Appeal No. 07-135 and Application of a Child with a Disability, Appeal No. 07-119 in District Court. The two cases were consolidated into one action, which currently remains pending in federal court as of the date of this decision.

[2] The written transcript of the June 5, 2009 CSE meeting mistakenly noted the date of the CSE meeting as "June 4, 2009" (compare Dist. Ex. 9 at p. 1, with Parent Ex. EEEEE at p. 1).

[3] For purposes of clarity throughout this decision, the June 5, 2009 IEP represents the student's finalized IEP for the 2009-10 school year, as the May 7, 2009 CSE meeting ended after 90 minutes without a decision being reached regarding the student's recommended placement (Dist. Ex. 9 at pp. 1-18; compare Dist. Ex. 8 at pp. 1-2, 8-9, 15-16, with Dist. Ex. 9 at pp. 1-2, 8, 14-16). As noted in the June 2009 IEP committee meeting information, "the parent did not agree to the CSE recommendation" (Dist. Ex. 9 at p. 8).

[4] According to district policy, the "goal of inclusion [was] to educate every child in [the] most appropriate school environment" (Parent Ex. LLLLL). The district policy described inclusion as an "instructional teaching model that [was] incorporated within the mandated construct of least restrictive environment" (LRE) and that the special education teacher, regular education teacher, and related services providers would be "responsible for collaborating and implementing the IEP, making modification in curriculum, assessment, assignments, and materials and for determining the grades for each" inclusion student (id.). In State regulations, this instructional environment is typically referred to as "integrated co-teaching services" (8 NYCRR 200.6[g] [defining integrated co-teaching services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students"]). In addition, State regulations define direct consultant teacher services as the following: "specially designed individualized or group instruction provided by a certified special education teacher . . . , to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]; see 8 NYCRR 200.6[d][1]-[2] [defining and describing consultant teacher services within the continuum of services for students with disabilities]).

the student receive the daily, 1:1 tutorial services in a non-integrated setting (see Dist. Ex. 9 at p. 1).[5]

In addition, the CSE recommended the use of the following program modifications in all of the student's academic classes for the 2009-10 school year: a graphic organizer, a "Lightspeed" auditory enhancer, a laptop, and Kurzweil software (Dist. Ex. 9 at p. 2). The CSE also recommended the following testing accommodations for the 2009-10 school year: extended time (2.0) for New York State Tests, in addition to frequent breaks and answers recorded in a test booklet; small group administration; special location; directions explained; directions read; use of a word processor (or laptop with Kurzweil software), calculator and word bank; and preferential seating (id. at pp. 2-3).

For the 2009-10 school year, the CSE included academic annual goals to address the student's areas of need in writing, study skills, and career/vocational/transition (Dist. Ex. 9 at pp. 14-18). In writing, the CSE designed the annual goals to improve the student's ability to—at a 10th grade level—use correct punctuation and transition words; compose a five-paragraph essay related to a topic without irrelevant information; self-correct errors in grammar, punctuation, and spelling; compose a logical, sequential five-paragraph essay using topic sentences and supporting details; compose a coherent, sequential seven-paragraph essay; and use the processes of prewriting, drafting, revising, and proofreading to compose a six-paragraph story or essay (id. at pp. 16-17). Annual goals to address the student's study skills targeted her need to record homework or assignments in a planner; using a planner to keep track of assignment due dates; turning homework in on time; using mnemonic techniques to memorize 10th grade content area material for tests; developing and completing study guides for tests with teacher support; using scaffolding and underlining to highlight important information while reading 10th grade content area material; and accepting assistance from a special education teacher to complete assignments (id. at p. 15). For the area of career/vocational/transition, the CSE recommended annual goals that focused on completing the student's College Board application, exploring occupational and educational options, and meeting with a guidance counselor to discuss careers of interest for the student (id. at pp. 17-18).

By letters dated August 13, 2009, the district forwarded the student's 2009-10 IEP to the parent (Dist. Ex. 32 at pp. 1, 4). For the 2009-10 school year, the parent decided to place the student at Landmark rather than enroll the student in a public school placement (see Dist. Ex. 2 at pp. 2-7; Parent Exs. BB-CC).[6] The Commissioner of Education has not approved Landmark as a

[5] The following individuals from Landmark attended the May 2009 CSE meeting: the student's case manager, the student's grammar and composition teacher, and the student's U.S. History II teacher (see Dist. Ex. 8 at p. 8; compare Dist. Ex. 60 at p. 2, with Dist. Ex. 24 at pp. 1, 3; see also Tr. pp. 1151, 1153-54, 1185-87, 1860, 1862-63, 1869, 1871-73, 1876). The following individuals from Landmark attended the June 2009 CSE meeting: the student's case manager, the student's study skills teacher, the student's literature teacher, and the student's geometry teacher (see Parent Ex. EEEEE at p. 1; compare Dist. Ex. 60 at p. 4, with Dist. Ex. 24 at pp. 2, 6-7; see also Tr. pp. 1151, 1153-54, 1191-95).

[6] The hearing record does not include documentary evidence to establish whether the parent timely provided the required 10-day notice of the student's unilateral placement at Landmark for the 2009-10 school year (see Dist. Exs. 1-66; Parent Exs. A-J; L-M; V-Z; AA-CC; GG-HH; JJ-PP; RR-ZZ; AAA-EEE; GGG; III-XXX; AAAA-ZZZZ; AAAAA-EEEEE; HHHHH-ZZZZZ; IHO Ex. i-iii). The parent testified, however, that she made the determination to unilaterally place the student at Landmark for the 2009-10 school year at the "end of August" (see Tr. pp. 1917-18; Dist. Ex. 2 at p. 4 [indicating that the parent "forwarded a notice of unilateral placement to

school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]). In this case, the student completed 11th grade and began attending 12th grade at Landmark, where the parent has unilaterally placed her for 7th grade (2006-07), 8th grade (2007-08), 9th grade (2008-09), 10th grade (2009-10), and 11th grade (2010-11) (see Tr. pp. 1, 1151-53, 1175-79, 1200-02, 1923-24, 2030; Dist. Exs. 2 at p. 1; 62-66).

By letters dated February 12, and March 30, 2010, the district requested consent from the parent to conduct a variety of evaluations as part of the student's triennial reevaluation (Dist. Exs. 33 at pp. 1-2, 5-6; 34 at pp. 1-2). Generally, the triennial reevaluation consisted of a social history update (May 19, 2010), an audiological and auditory processing assessment (May 10, 2010), a classroom observation of the student at Landmark (May 17, 2010), a speech-language evaluation (May 27, 2010), a neuropsychological evaluation (May 19 and 24, 2010; including an addendum to the original evaluation report), an educational reevaluation (June 22, 2010), and an assistive technology evaluation (June 22, 2010) (see Dist. Exs. 14-20).[7] Results of the numerous assessments of the student's cognitive skills, auditory processing skills, speech-language skills, memory skills, and academic skills indicated that her overall abilities fell within the average to superior range of functioning, with the exception of the following skills: working memory, her ability to integrate more complex and lengthier auditory material, her ability to recall and reproduce sentences of varying length and syntactic complexity, and her ability to immediately recall auditory and visual material (see Dist. Exs. 15; 17-19).

For the 2010-11 school year, the CSE convened on June 3, June 24, July 23, and September 17, 2010 to conduct the student's annual review and to develop her IEP for 11th grade (Dist. Exs. 10A at p. 1; 10B at p. 1; 11 at p. 1; 60 at pp. 5-18; Parent Exs. CCCCC at pp. 1-37; DDDDD at pp. 1-52; KKKKK at pp. 1-90).[8] Based upon the review and consideration of the student's triennial

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the district" on "August 21, 2009"]). The hearing record also does not include documentary evidence to establish when, or if, the parent executed a reenrollment contract with Landmark for the student's attendance during the 2009-10 school year (see Dist. Exs. 1-66; Parent Exs. A-J; L-M; V-Z; AA-CC; GG-HH; JJ-PP; RR-ZZ; AAA-EEE; GGG; III-XXX; AAAA-ZZZZ; AAAAA-EEEEE; HHHHH-ZZZZZ; IHO Ex. i-iii). The parent testified that although she may have retained a copy of the 2009-10 reenrollment contract, the document was unavailable to her due to a recent flood (see Tr. pp. 1918-20).

[7] Specifically, the evaluators administered the following subtests or complete assessments as part of the triennial reevaluation: the Staggered Spondaic Word Test, the Dichotic Digits Test, Willeford's Binaural Separation Test of Competing Sentences, the Speech-In-Noise test, the Low-Pass Filtered Speech Test, the Time-Compressed Sentence Test, the Phonemic Synthesis Test, the Pitch Patterns Sequence Test, the Duration Patterns Sequence Test, the Random Gap Detection Test, the Masking Level Difference test, the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4), the Comprehensive Assessment of Spoken Language (CASL), the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Perdue Pegboard Test, the IVA + Continuous Performance Test, the Tower of London-Drexel Version test, the Contingency Naming Test, the Comprehensive Test of Phonological Processing, the DKEFS Verbal Fluency test, the Wechsler Individual Achievement Test-Third Edition (WIAT-III), Rey Osterrieth Complex Figure: Copy and Recall, the California Verbal Learning Test-Children's Version, the Prospective Memory Screening, the Child Behavior Checklist/Profile-Parent & Teacher Forms, the Behavior Rating Inventory of Executive Functions-Parent & Teacher Forms, and the Woodcock-Johnson III Tests of Achievement-Third Edition (WJ ACH III) (Dist. Exs. 15 at pp. 4-10; 17 at pp. 8-10; 18 at pp. 3, 12; 19 at pp. 3-4; see Dist. Ex. 12 at p. 9). Additionally, an audiologist conducted an audiometric evaluation of the student that revealed "essentially normal hearing sensitivity" for both ears (Dist. Ex. 15 at p. 10).

[8] Although the district finalized the student's 2010-11 IEP immediately after the July 23, 2010 CSE meeting, provided the parent a copy of the student's 2010-11 IEP by letter dated July 29, 2010, and the parent had rejected

reevaluation reports and the her most recent progress reports from Landmark, dated May 2010, the CSE recommended placing the student in an 8:1 inclusion program for English, mathematics, social studies, science, and science lab; and for the student to receive a daily 1:1 tutorial for the 2010-11 school year (see Dist. Exs. 10A at pp. 1, 10; 10B at pp. 1, 10-11; 11 at pp. 1-2, 11-12 [identifying the inclusion program for the student's core academic courses on the IEP as "Consultant Teacher Direct" services in an "Integrated" setting]; 60 at pp. 5-18; see also Parent Exs. CCCCC at pp. 1-37; DDDDD at pp. 1-52; KKKKK at pp. 1-90; compare Dist. Ex. 11 at pp. 1-2, with Dist. Ex. 9 at pp. 1-2, 8). However, for the 2010-11 school year, the CSE also recommended that the student receive daily 1:1 reading instruction in the classroom, and one session per six-day cycle of small group speech-language therapy services in the therapy room (i.e., one session of speech-language therapy every six days) (see Dist. Ex. 11 at pp. 1-2, 11).[9]

For the 2010-11 school year, the CSE recommended program modifications, and in addition, incorporated functional descriptions of the program modifications in the student's IEP as follows: use of a graphic organizer (to assist the student with organizing facts and ideas for written expression); checking for understanding (to address the student's short-term memory deficits by utilizing multimodality presentation of materials and checking for understanding, as well as the use of varied practice and intermittent recall activities to assist building concepts and learning); providing copies of class notes (to assist the student with recall of auditory and visual material); breaking information down into smaller steps (to assist the student with understanding of concepts and recalling steps for problem solving); preferential seating (to assist the student with processing and multimodal presentation that may be individualized); reteaching of materials (requiring the student's tutor to review and clarify any concepts necessary to assist the student's understanding of class materials and to coach the student with class assignments and studying, as needed); use of a planner (to help the student with organizing and documenting events and assignments for school, and requiring the student's tutor to review the planner with the student on a daily basis) (see Dist. Ex. 11 at p. 2).

In the area of assistive technology for the 2010-11 school year, the CSE recommended that the student receive books on CD (noting that texts have corresponding CDs to assist with rereading class assignments in a multimodality manner for use in the student's program in the district); use of a laptop (requiring a laptop that could accommodate updated Kurzweil and Inspiration programs as needed for use in the student's program in the district); use of Kurzweil software (providing an updated version to assist the student with reading texts for use in the student's program in the district); use of the Inspiration program (to assist with written expression for use in the student's

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the district's recommended program and placement set forth in the July 23, 2010 IEP by letter dated August 23, 2010, the CSE reconvened on September 17, 2010 to review an independent education evaluation (IEE) report that the parent requested by letter dated July 23, 2010 (see Dist. Exs. 43; 60 at pp. 15-18; Parent Exs. F-I; GG at pp. 1-2; CCCCC at pp. 1-37). The CSE's review and consideration of the IEE evaluation report in September 2010, however, did not result in any revisions to the July 23, 2010 IEP for the 2010-11 school year (see Dist. Ex. 11 at pp. 1-14; Parent Ex. CCCCC at pp. 1-37). For purposes of clarity throughout this decision, the July 23, 2010 IEP represents the student's finalized IEP for the 2010-11 school year.

[9] The student's case manager at Landmark attended the June 3, June 24, and July 23, and September 17, 2010 CSE meetings (see Parent Exs. CCCCC at p. 1; DDDDD at p. 1; KKKKK at p. 1; see also Tr. pp. 1198-1206).

program in the district); and access to "Bookshare" (to assist with the student's textbook and literature needs for use in the student's program in the district] (Dist. Ex. 11 at pp. 2-3).[10]

Regarding supports for school personnel during the 2010-11 school year on behalf of the student, the CSE recommended a monthly team meeting to monitor progress and to problem-solve any then-current issues affecting the student's success at the district, and to provide training in the use of assistive technology devices to the student, district staff, and the parent (Dist. Ex. 11 at p. 3). Additionally, the CSE recommended engaging a consultant to monitor the student's success and her school program and to meet with the special education teachers and the student (id.). As part of that service model, the consultant would observe the student in class and review her work samples (id.). With respect to testing accommodations for the 2010-11 school year, the CSE recommended that the student receive extended time (2.0) for New York State Tests, in addition to frequent breaks and answers recorded in a test booklet; administration in a small group; special location; directions explained; directions read; use of a word processor (or laptop with Kurzweil software), a calculator, and word bank; preferential seating; and frequent breaks from the testing routine (as needed within the student's accommodation for time) (id. at pp. 3-4).

Turning to the annual goals for the 2010-11 school year, the CSE recommended goals to address the student's reading and speech-language needs (see Dist. Ex. 11 at pp. 12-14). For reading, the annual goals targeted the student's need to improve her ability to accurately decode multisyllabic vocabulary words related to content area curriculum, to orally read grade-level materials with fluency, and to orally answer comprehension questions related to grade-level content area material (id. at pp. 12-13). In the area of speech-language, the CSE developed annual goals focused on improving the student's auditory processing needs, such as her ability to recall and comprehend a sequence of three events presented orally from a sentence and paragraph, and to recall and comprehend a sequence of five events presented orally from a five-paragraph short story (id. at pp. 13-14).

By letter to the district dated July 23, 2010, the parent requested an IEE at district expense, and indentified a particular individual she had selected to perform the requested IEE (see Dist. Ex. 43; see also Tr. pp. 736-77, 773 [indicating that the parent contacted the IEE evaluator in spring 2010 to inquire about an IEE]; Dist. Ex. 44 at pp. 1-2).[11]

By letters dated July 29, 2010, the district provided the parent with the student's finalized 2010-11 IEP (see Parent Exs. G-H).

In an email dated August 10, 2010, the parent requested that the district convene a CSE meeting to review the IEE evaluation report, and she provided the district with a release allowing the CSE to speak to the IEE evaluator (see Dist. Ex. 45 at p. 1; see also Dist. Ex. 45 at p. 2

[10] Committee meeting information in the July 23, 2010 IEP indicated that the CSE also approved a "Pulse Pen" for the student to use in appropriate lecture environments in the district's program (see Dist. Ex. 11 at p. 11).

[11] At the time the parent requested the IEE on July 23, 2010—and unbeknownst to the district—the requested IEE had already been conducted on July 3, 2010, the evaluator had already completed his evaluation report on July 19, 2010, and the evaluator had already met with the parent and the student on either July 19 or 22, 2010—immediately before the July 23, 2010 CSE meeting—to review his findings and his report (see Tr. p. 1798; Dist. Exs. 21 at p. 1; 43; 51 at p. 3; 60 at pp. 15-18; Parent Ex. CCCCC at pp. 1, 11).

[indicating that the district contacted the IEE evaluator on August 10, 2010 to discuss possible dates for a CSE meeting]). On August 17, 2010, the parent provided the district with a copy of the IEE evaluation report via facsimile (see Dist. Ex. 47 [instructing the district that it could not "share" the report with "anyone without prior written permission" from the parent]).

By letter dated August 23, 2010, the parent rejected the 2010-11 public school program and notified the district of her intention to unilaterally place the student at Landmark for the 2010-11 school year at public expense (Parent Ex. GG at pp. 1-2; see Dist. Ex. 51 at pp. 1-5 [responding to parent's notice of unilateral placement by letter dated September 3, 2010]).[12] In addition to expressing complaints about the lengthy evaluation process, the necessity of convening numerous CSE meetings to review the student's reevaluations, the delay in completing the reevaluation process, and the inconvenience caused by the need to reschedule CSE meetings, the parent indicated that the IEP finalized after the July 23, 2010 CSE meeting "ignore[ed] most of the recommendations of the District's Independent Evaluators" and that the IEP contained "numerous errors and voids to questions and specifics requested at the July 23rd meeting," which the parent characterized as "[c]rucial information" that a parent "would need to know to accept this IEP" and which had been "communicated to [the district] by e-mail on August 10, 2010" (Parent Ex. GG at p. 1).[13] Next, the parent indicated that the district failed to adhere to "promise[s] that numerous items on the proposed IEP would be in place by August 1, 2010" and that to date, the items were "still not in place," noting that a "written IEP [was] only effective if it c[ould] be implemented" (id. at p. 1). The parent also alleged that the district failed to comply with her requests to schedule a CSE meeting to review the IEE evaluation report (id.). As relief, the parent requested reimbursement for "all the costs [she] encumber[ed] related to [the student's] attendance at

[12] In an email dated August 23, 2010, the parent requested an IEE for a central auditory processing and speech-language evaluation, and identified an evaluator selected by the parent to perform the IEE (hereinafter referred to as the 2010 IEE speech-language evaluation report) (see Dist. Exs. 49; 53 at pp. 1-2 [approving the parent's requested IEE by letter dated September 20, 2010]). This requested IEE was completed on October 9, 2010, and therefore was not reviewed or considered during the development of the student's 2010-11 IEP (see Dist. Ex. 22 at pp. 1-13). This IEE was conducted by the same speech-language pathologist who previously conducted the student's 2007 speech-language therapy evaluation (compare Dist. Ex. 22 at pp. 1, 10, with Dist. Ex. 13 at pp. 1, 9).

[13] In the August 10, 2010 email, the parent wrote to the district, indicating in bold typeface: "This is a follow-up to our phone conversation last Friday. You promised to contact me on Monday. Today is Tuesday, I have not yet heard from you." (Parent Ex. KKK at p. 2). The parent further indicated that she had expected a response from the district regarding "the information promised concerning [the student]" and that she had received a copy of the IEP completed "AFTER" the July 23, 2010 CSE meeting (id. at p. 1 [emphasis in original]). Without elaboration, the parent asserted that the IEP contained "many inaccuracies," and the IEP did not "reflect the meeting [she] attended on July 23rd" (id.). Next, the parent alleged that the district made "many unilateral decisions . . . on the IEP that were not on the draft IEP[s] dated June 3rd and June 24th and not agreed to at the July 23rd CSE" (id.). The parent then asked if "this issue" could be addressed at the CSE meeting she requested in order to review the IEE evaluation report (id.). The parent also alleged that the director's CSE "'notes'" taken at the July 23, 2010 CSE meeting—which had been provided to the parent—"selectively omitted" "vital issues and comments" that occurred at the CSE meeting, and the parent wanted the "actual notes" taken by the director at the July 23, 2010 CSE meeting, which the parent asserted that the director had used to "finalize the IEP" (id.). In an email dated August 10, 2010, the district's director of pupil personnel services (director) responded to the parent's August 10, 2010 email (see Parent Ex. KKK at pp. 1-2).

Landmark for the 2010-11 school year," including "transportation, tuition, legal fees, and any other unforeseen cost or encumbrances born by [her]" (id. at p. 2).[14]

A. Due Process Complaint Notice

By due process complaint notice, dated March 29, 2011, the parent alleged that the district failed to offer the student a FAPE for the 2009-10 and 2010-11 school years (Dist. Ex. 2 at pp. 1, 4-6). With respect to the 2009-10 school year, the parent asserted that the district failed to provide prior written notice regarding the CSE's recommendations; the district failed to provide "copies of IEPs" to the parent in a "timely fashion;" the district failed to consider and evaluate the student's need for ESY services to prevent substantial regression; the district failed to "implement a transition plan" as required; the district failed to provide assistive technology, such as an "individual auditory trainer" and "training and support in using software (Kurzweil, Dragon Naturally Speaking) and textbooks and reading materials in an alternate format;" the district failed to consider the "opinions" of the Landmark teachers; the district denied the parent an opportunity to meaningfully participate in the "process;" and the district impermissibly engaged in predetermination of the student's 2009-10 program and placement (id. at pp. 4-5).[15]

With regard to the 2010-11 school year, the parent asserted that the district "failed to consider" the updated, current evaluation reports from two evaluators; the district failed to "consider the opinions" of the Landmark teachers; the district denied the parent an opportunity to meaningfully participate in the "process;" the district recommended a program not reasonably calculated to address the student's needs; the district failed to rely on "any up-to-date expert evaluations;" the district impermissibly engaged in predetermination of the student's 2010-11 program and placement; the district failed to provide prior written notice regarding the CSE's recommendations; the district failed to provide "copies of IEPs" in a "reasonable and timely manner;" the district failed to consider and evaluate the student's need for ESY services to prevent substantial regression; the district failed to provide assistive technology, such as an "individual auditory trainer" and "training and support in using software (Kurzweil, Dragon Naturally

[14] The hearing record does not include documentary evidence to establish when, or if, the parent executed a reenrollment contract with Landmark for the student's attendance during the 2010-11 school year (see Dist. Exs. 1-66; Parent Exs. A-J; L-M; V-Z; AA-CC; GG-HH; JJ-PP; RR-ZZ; AAA-EEE; GGG; III-XXX; AAAA-ZZZZ; AAAAA-EEEEE; HHHHH-ZZZZZ; IHO Ex. i-iii). The parent testified, however, that she executed a reenrollment contract for the student to attend Landmark for the 2010-11 school year "[s]ometime in August of that year, of 2010" (Tr. pp. 1937-38).

[15] Broadly construing the parent's due process complaint notice, it appears that the parent's claim regarding predetermination of the student's 2009-10 program encompassed specific factual issues that the CSE failed to discuss or develop the finalized 2009-10 IEP, which the parent received in August 2009, at "any CSE attended by the parents or the student," that the CSE "never developed and/or approved the goals or any placement and/or service recommendation," and that the CSE chairperson's statements at the beginning of the June 2009 CSE meeting was conclusive evidence of impermissible predetermination of the student's program for the 2009-10 school year (see Dist. Ex. 2 at pp. 3-4, 6). In the due process complaint notice, the parent admitted receiving the student's 2009-10 IEP on "August 20, 2009" (id. at p. 4).

Speaking) and textbooks and reading materials in an alternate format;" and the district failed to "implement a transition plan" (Dist. Ex. 2 at p. 6 [emphasis in original]).[16]

Next, the parent contended that Landmark was an appropriate placement, the student made progress at Landmark—academically and socially/emotionally—and the student's unilateral placement at Landmark was consistent with the recommendations of two evaluators (Dist. Ex. 2 at p. 6). In addition, the parent alleged that the district did not, and could not, identify an "alternative day program within reasonable driving distance" of the student's home (id.). The parent also asserted that she had cooperated fully in the IEP development process, in direct contrast to the district's actions (id.).

As relief, the parent requested findings that the 2009-10 and 2010-11 IEPs failed to offer the student a FAPE, and annulment of both IEPs (Dist. Ex. 2 at p. 6). In addition, the parent sought the development of a new IEP recommending an appropriate placement, reimbursement for the costs of the student's tuition at Landmark for the 2009-10 and 2010-11 school years, additional services to "compensate for [the] deprivation of instruction," reimbursement for the costs of the "technology supports" the district "refused to supply," and payment of the parent's attorney fees and costs (id. at pp. 6-7).[17]

B. IHO Decision

The parties proceeded to an impartial hearing on June 6, 2011, and concluded on October 13, 2011, after 12 days testimony, and the presentation of documentary evidence (see Tr. pp. 1-2128; Dist. Exs. 1-66; Parent Exs. A-J; L-M; V-Z; AA-CC; GG-HH; JJ-PP; RR-ZZ; AAA-EEE; GGG; III-XXX; AAAA-ZZZZ; AAAAA-EEEEE; HHHHH-ZZZZZ; IHO Ex. i).[18] Both parties also submitted post-hearing briefs to the IHO after the conclusion of the impartial hearing (see Tr. p. 2110; IHO Exs. ii-iii).

In a 56-page decision dated December 13, 2011, the IHO briefly summarized the procedural history of the case, and reviewed the legal standards applicable to the case (see IHO Decision at pp. 1-11). With respect to the 2009-10 school year, the IHO concluded that the 2009-10 IEP developed at the May and June 2009 CSE meetings was consistent with the findings in the student's most recent evaluations at the time of the CSE meetings: a 2007 neuropsychological evaluation report and an August 2007 auditory processing and speech-language evaluation report (hereinafter, the 2007 speech-language evaluation) (id. at pp. 15-16). Next, the IHO analyzed the following procedural inadequacies alleged by the parent: the district's "recommendation was predetermined;" the CSE failed to "recommend a program and the IEP was not discussed or developed at a CSE meeting attended by the parent or student;" and the CSE "ignored the

[16] In the due process complaint notice, the parent admitted receiving the student's 2010-11 IEP on "July 30, 2010," but noted that it was "not written at the CSE held on July 23, 2010 nor did it reflect the discussion at that meeting," and that the 2010-11 IEP "contained many errors and inaccuracies" (Dist. Ex. 2 at pp. 5-6).

[17] In the due process complaint notice, the parent—specifically related to the 2010-11 school year—asserted that the district failed to "fulfill its agreement to ensure that [assistive technology] services would be in place by August 1, 2010," the district delayed its approval of the two IEEs requested by the parent, and the parent's request "for a CSE meeting to address these issues was denied" (Dist. Ex. 2 at pp. 5-7).

[18] Several of the impartial hearing dates occurred on consecutively scheduled days (see IHO Decision at p. 4).

recommendation of the student's teachers at Landmark and those that knew the student best" (id. at pp. 16-20).

The IHO found that contrary to the parent's assertion that the CSE impermissibly engaged in predetermination of the student's 2009-10 IEP and recommendations, the evidence indicated that while the CSE chairperson's opening remarks at the June 2009 CSE meeting reflected her "frustration," the CSE meeting continued for approximately 90 minutes and included an "extensive discussion among all of the participants regarding the student's levels, abilities and needs" (IHO Decision at pp. 17-18). Similarly, the IHO also concluded that neither the parent nor the Landmark teachers attending the May or June 2009 CSE meetings were precluded from meaningfully participating in the development of the student's 2009-10 IEP, noting that "ample evidence" existed to establish that the CSE participants "engaged in a thorough and extensive discussion regarding the student's current levels, strengths and weaknesses, progress and education program, both at Landmark and the coming year" at the district (id.). The IHO noted that while the CSE chairperson started the June 2009 CSE meeting by stating that the recommended placement would be in a district resource room setting, the continuing discussions over the course of the June 2009 CSE meeting—with substantial input from the student's Landmark teachers—served as the "catalyst" for the district's special education teacher, and thereafter the district's school psychologist, attending the CSE meeting to "reflect upon other placement options such as an inclusion placement" (id. at pp. 18-19). The IHO characterized the discussions regarding the student's placement as "clearly an organic and evolving discussion among all of the CSE participants" (id. at p. 19). Ultimately, as a result of the ongoing discussions, the CSE altered its initial recommendation of resource room to a district inclusion program with a 1:1 tutorial (id.). Based upon this evidence, the IHO concluded that the district did not impermissibly predetermine the student's 2009-10 IEP and program (id.).

The IHO then addressed the parent's assertion that the CSE failed to "recommend a program and the IEP was not discussed or developed at a CSE meeting attended by the parent or student," and concluded that the assertion was without merit (IHO Decision at pp. 17, 19-20). Based upon her review of the recorded June 5, 2009 CSE meeting and the written transcript of that meeting, the IHO concluded that the CSE's recommendation to place the student in an inclusion program for her core academic classes with an additional 1:1 tutorial was clearly articulated near the conclusion of the meeting (id. at p. 19). In addition, the IHO noted that although comments made at the June 2009 CSE meeting indicated that the district would be "willing to evaluate the student during the summer," the statement did not "vitiate the recommendation as stated at the meeting and embodied in the final IEP" (id.). The IHO also determined that the parent actively participated in the discussions of the student's recommended program, stating her "concerns and disagreement with the recommendation" (id. at pp. 19-20).

Turning next to whether the CSE "ignored the recommendation of the student's teachers at Landmark and those that knew the student best," the IHO also found this allegation to be without merit (IHO Decision at p. 20). Relying upon the evidence in the written transcript of the June 2009 CSE meeting, the IHO found that the CSE did not ignore the input from the student's Landmark teachers, because the CSE's recommended placement for the 2009-10 school year ultimately changed after the Landmark teachers shared information about the student (id.). She also found that the CSE considered information from the Landmark progress reports and that the CSE incorporated "changes and modifications" into the IEP based upon the Landmark teachers' input, referring specifically to the changes made to the annual goals (id.).

Finding no procedural inadequacies with respect to the 2009-10 school year that would rise to the level of a denial of a FAPE, the IHO analyzed the following substantive inadequacies asserted by the parent: the IEP did not provide for "small classes;" the recommended "inclusion program with two teachers in the class would create auditory confusion for the student;" "1:1 instruction [was] too restrictive;" the annual goals were "inconsistent with the student's needs;" and the IEP failed to "adequately address a transition plan" (IHO Decision at pp. 20-23). After reviewing the testimonial evidence describing how the district's inclusion program with a 1:1 tutorial functioned and the recommendations contained in the most recent neuropsychological and speech-language evaluations available to the May and June 2009 CSEs, the IHO concluded that the student's 2009-10 IEP accurately reflected the recommendations and that the testimony credibly established that the inclusion program with the 1:1 tutorial "would provide the student with varied methodologies, 1:1 assistance with organization and study skills, direct instruction, assistance with note taking and study guides; support services for writing and a modified curriculum, homework, and grades as needed" (id. at pp. 21-22). Next, the IHO concluded that contrary to the parent's argument, the regular education teacher and the special education teacher staffing the student's inclusion classrooms "would be able to collaborate such that the student's auditory processing needs [were] addressed so that the student [was] not presented with two messages at the same time," and thus, determined that the parent's assertion was without merit (id. at p. 22).

To the extent that the parent contended that the Landmark staff, the speech-language pathologist, and the parent, herself, advocated for a "small class setting" for the student, the IHO initially noted that "most students would benefit from a smaller class size" (IHO Decision at p. 22). However, the IHO also noted that the issue presented was whether the student could make meaningful progress in an inclusion setting with "24-28" students with the "additional classroom support of a special education teacher, a 1:1 daily tutorial in addition to modifications and accommodations tailored to meet the student's specific needs" (id.). Based upon the evidence demonstrating the student's "excellent academic performance and academic testing in the average to high average range," the IHO concluded that the student would make meaningful progress in the district's recommended program (id.). The IHO also indicated that she was not persuaded by the parent's argument that the 1:1 daily tutorial was "too restrictive" for the student, because the student made progress in a "far more restrictive setting of a residential placement in classes of no more than [12] students all diagnosed with a learning disability" (id.). The IHO also found that the purpose of the daily 1:1 tutorial was to provide the student with "additional structural supports as she transition[ed] to a less restrictive inclusion class" (id.).

Finally, with regard to the 2009-10 school year, the IHO addressed the parent's assertions that the IEP failed to adequately address a transition plan and that the annual goals were not consistent with the student's needs. The IHO rejected both arguments, noting that the recommended placement in an inclusion program with a daily 1:1 tutorial was "specifically recommended" to address the student's transition back to the district, and further, that the annual goals addressed the student's identified deficits in the areas of study skills, writing, and career transition (IHO Decision at pp. 22-23). Based upon the foregoing, the IHO concluded that the district offered the student a FAPE for the 2009-10 school year and that the IEP "accurately reflected the student's strengths and weaknesses and the program developed would allow her to make meaningful progress in a class with her typically developing peers" (id. at p. 23).

Turning to the 2010-11 school year, the IHO reviewed and discussed, at length, the triennial reevaluation reports completed prior to and during the development of the student's 2010-11 IEP—and in particular, the findings and recommendations, if any, contained within the triennial reevaluation reports—which the district reviewed and considered at the June 3, June 24, and July 23, 2010 CSE meetings (IHO Decision at pp. 24-32). Although noting that the district finalized the student's 2010-11 IEP after the July 2010 CSE meeting, provided the parent with the student's 2010-11 IEP by letter dated July 29, 2010, and that the parent had rejected the district's recommended program and placement for the 2010-11 school year by letter dated August 23, 2010, the IHO also reviewed and discussed the IEE evaluation report, which a September 17, 2010 CSE reviewed and considered (see id. at pp. 32-36).

Next, the IHO addressed the question of whether the district offered the student a FAPE for the 2010-11 school year (IHO Decision at pp. 36-45). According to the parent's arguments, the district's 2010-11 IEP failed to offer the student a FAPE because the "CSE 'distained the recommendation of multiple evaluators who conducted numerous tests and spent extensive time with [the student], who concurred with the recommendations of [the student's] teachers and case manager,'" and because the "recommended placement [was] fundamentally inconsistent with the student's established needs and that small class size was 'the nearly universal recommendation of the evaluators and service providers'" (id. at p. 36). However, contrary to the parent's assertion, the IHO indicated that the June and July 2010 CSEs convened for a total of approximately 5 hours and 50 minutes to develop the student's 2010-11 IEP, during which time the CSEs "meticulously" reviewed the 2010 neuropsychological evaluation report, the 2010 speech-language evaluation report, the 2010 classroom observation report, the 2010 educational reevaluation report, a 2010 audiological evaluation report, and the 2010 assistive technology evaluation report, as well as a "four year high school plan created by the student's anticipated guidance counselor" at the district (id. at pp. 36-37). In addition, the IHO indicated that the September 17, 2010 CSE reconvened for "over an hour" to review the IEE evaluation report (id. at p. 37).

However, the IHO acknowledged that while a CSE was required to consider all evaluative information, a CSE was not required to "adopt all of the recommendations contained therein," and based upon a review of the evidence, the IHO concluded that the CSE in this case considered and incorporated "many, if not most, of the recommendations of the evaluators, Landmark staff and parents" (IHO Decision at p. 37). With respect to the parent's assertion that the CSE did not adopt the evaluators' and service providers' recommendation for a small class, the IHO indicated that—similar to her analysis of the same issue for the 2009-10 school year—the issue presented was whether the student could make meaningful progress in an inclusion setting with "24-28" students with the "additional classroom support of a special education teacher; 1:1 daily tutorial; 1:1 daily reading; speech language therapy; program modifications; assistive technology; and testimony accommodations" (compare IHO Decision at pp. 22, with IHO Decision at p. 37). Similar to her conclusion regarding the 2009-10 school year, the IHO concluded with respect to the 2010-11 school year that "[g]iven the student's excellent academic performance and academic testing in the average to high average range, it is likely that the student would make meaningful progress in the recommended program" (id.).

Referencing the 2010 neuropsychological evaluation of the student, the IHO noted that an administration of the WISC-IV revealed that the student's "general intellectual functioning" fell within the "average range with processing speed in the superior range . . . , despite significant weakness in working memory" and that the student's academic skills—as measured by the WIAT-

3—were "average to slightly above average, noting that the student's writing skills were particularly impressive" (IHO Decision at pp. 37-38). Overall, the neuropsychologist who conducted the 2010 evaluation identified the student's "single weakness" as "problematic phonological auditory recall of new information" (id. at p. 38). Given these findings, the IHO determined that the neuropsychologist's recommendation in his evaluation report to place the student in a "'setting with smaller class sizes alongside student with language-based learning disabilities'" was not consistent with the results of the student's testing, and therefore, it was reasonable for the CSE to not follow this particular recommendation (id.). In addition, the IHO noted that the district's recommended placement of the student in an inclusion setting "with no more than [8] inclusion student in a class of 24-28 students with a consultant and daily 1:1 support [was] not that far from the small class recommended" by the neuropsychologist, which he described in his testimony at the impartial hearing as "less than twenty students with one teacher and an assistant" (id.). Moreover, the IHO found it reasonable for the CSE to not follow all of the neuropsychologist's recommendations because "some of his conclusions [were] based on pure speculation as to how the student would have progressed if she had attended public school, as opposed to Landmark" (id. at pp. 38-39). Finally, the IHO noted that although the CSE did not ultimately follow the neuropsychologist's recommendation to place the student in a small class setting, the CSE did incorporate the following recommendations from the evaluator's report into the student's 2010-11 IEP: "instruction that focuse[d] on building fluency and automaticity and comprehension in reading, technology supports, the repetition of material, instruction that [was] multi sensory in nature and pragmatic intervention on an ongoing and intensive basis" (id. at p. 39).

Next, the IHO focused her analysis on the IEE evaluation report and whether the district ignored the IEE evaluator's opinion that the student "should not return" to the district (IHO Decision at pp. 39-42). Initially, the IHO noted that although the parent requested this IEE evaluation to "ostensibly contest the findings of . . . the educational reevaluation," the IEE evaluator "unilaterally elected to conduct a personality assessment to assess the student's emotional functioning . . . [and had] elected to do so because a comprehensive neuropsychological and educational evaluation had already been recently conducted" (id. at p. 39).[19] Based upon his assessment, the IEE evaluator diagnosed the student as having an adjustment disorder with depressed mood (id. at p. 40). The IHO noted that at the impartial hearing, the IEE evaluator testified that the student "very much value[d] learning and education," and further explained that if the student "'perceive[d] that she [was] not getting the help she need[ed], and that she [was] not going to succeed academically, then that [made] her at risk for suicidal thinking,'" and noted the following recommendations in the IEE evaluation report to address the student's needs:

> weekly individual psychotherapy; it was advised that those working with the student should inquire if she [was] able to meet academic challenges and if she ha[d] access to the help she need[ed]; instructors should explain to the student the tools and methods being used to help her; the student's teachers should point out connections between specific behaviors and successful outcomes; teachers

[19] The IHO also noted that as part of the most recent neuropsychological evaluation of the student in May 2010, the evaluator assessed the student's "emotional and psychosocial adjustment," and determined that the student exhibited "'no significant difficulties with emotional and psychosocial adjustment'" (IHO Decision at p. 39).

> should provide the student with specific positive feedback; the student should be reassured that there [were] ample resources to meet the student's needs; school staff should point out practical applications for the student's skills, strengths and interests; and the student's curriculum should continue to require the student to participate in extra curricular activities

(id. at pp. 40-41).

In reviewing the 2010-11 IEP, the IHO noted that many of the IEE evaluator's recommendations had already been incorporated into the student's IEP with the "exception of placement at Landmark and weekly individual psychotherapy," noting, however, that psychotherapy was not "typically" provided in the "school environment" (IHO Decision at p. 41). The IHO also noted that the July 2010 CSE discussed the provision of counseling as a related service, and at that time, the CSE decided—with the parent in agreement—that counseling "could be more harmful than beneficial and that it would be best to observe the student" during her transition back into the district and make a determination with respect to counseling services at that time (id. at pp. 41-42). Considering this information, the IHO concluded that it was "reasonable" for the CSE to not incorporate all of the IEE evaluator's recommendations into the student's IEP, especially given the "limited time period" he spent with the student and that "no other evaluators identified similar needs" (id. at p. 42). She also indicated that the IEE evaluator's recommendations had been based, in part, upon "speculation as to future events that [were] not certain to occur," and moreover, that although the "cause of the student's alleged adjustment disorder may be her perception that she might have to return to [the district], [it did] not mean that [the district was] unable to provide the supports she need[ed] to believe that she [was] going to succeed academically" (id.).

The IHO then addressed the parent's assertion that the CSE disregarded the recommendations in a 2007 speech-language evaluation report, and those expressed by the parent and the Landmark case manager and teachers (IHO Decision at pp. 42-43). Contrary to the parent's assertion, however, the IHO determined that the evidence in the hearing record indicated that while the CSE did not recommend Landmark as the student's placement, the CSE considered the reports from Landmark and other shared information" about the student, noting specifically that the student's Landmark case manager "advocated for the Landmark model where instruction [was] provided in smaller classes rather than a 1:1 tutorial," and "emphasized the benefits of a smaller class size for the student and direct instruction" (id. at p. 42). Yet, despite this information, the IHO concluded that the student's need for a "residential placement was never established" (id.). In addition, the IHO noted that sufficient evidence existed in the hearing record to conclude that the student "would make meaningful progress in the recommended program at [the district]'" and that the district's recommended program was consistent with the least restrictive environment (LRE) principles under the IDEA and allowed the student to "reap the benefits of interacting with her typically developing peers" (id. at pp. 42-43).

The IHO also concluded that contrary to the parent's assertion that the district "would be either unable or unwilling to implement the recommended program and/or that the environment at [the district's] high school [was] inhospitable to the student, or even toxic," the hearing record did not contain sufficient evidence to support these allegations (IHO Decision at p. 43). The IHO was not persuaded that the parent's "prior experience with [her] other children" at the district was

sufficient to find that the student would "have similar experiences" (id.). Next, the IHO determined that "under the circumstances" of this case—where the student has attended Landmark continuously since seventh grade—it was "not at all surprising that the student wishe[d] to remain in her current placement where she ha[d] undoubtedly developed relationships that she value[d] and ha[d] realized academic success" (id.). However, this factor alone did not establish that the district's recommended placement and program was inappropriate or could not meet the student's educational needs (id.).

Next, the IHO addressed the parent's assertion that the district's recommended placement was overly restrictive because it incorporated a daily 1:1 tutorial, daily 1:1 reading instruction, and one session per six-day cycle of speech-language therapy in a small group setting (IHO Decision at p. 44). Contrary to the parent's argument, however, the IHO determined that the 1:1 tutorial and 1:1 reading instruction had been recommended by the CSE as "additional supports" for the student as she transitioned to an "inclusion class from the far more restrictive setting at Landmark" and thus, the recommendations were not overly restrictive "given the overall program recommendation" (id.). As for the recommended speech-language therapy, the IHO noted that it was "added to the student's program to address her need to develop self-advocating skills and compensatory strategies"—as suggested by an audiologist—who testified at the impartial hearing that the speech-language therapy was recommended to address the student's need to "improve [her] dichotic listening and peer self-advocating while in a group situation" (id.). Thus, the IHO concluded that the recommendation for speech-language therapy was appropriate to meet the student's identified areas of weakness (id.).

Finally, with respect to the 2010-11 school year, the IHO addressed the parent's assertions that the district failed to address the student's social/emotional needs in transitioning to a public school placement and that the annual goals were inconsistent with the student's needs (IHO Decision at pp. 44-45). Based upon the evidence, the IHO concluded that the district's recommended placement in an inclusion class with the additional supports of the daily 1:1 tutorial, daily 1:1 reading instruction, and small group speech-language therapy provided the student with the "services closest to what she was receiving at Landmark and would help her with the transition process" back into the district (id. at p. 44). The IHO further noted that the monthly team meetings and the consultant service on the student's IEP were also designed to assist the student's transition back into the district (id.). In addition, the evidence indicated that the CSE considered and rejected adding counseling as a related service to the student's IEP because of the "fear that in school counseling might stigmatize the student and could be more harmful than beneficial" and that the district had established a plan to effectively deal with the student's return to the district (id.). With regard to the annual goals, the IHO noted that they appropriately addressed the student's speech-language and reading needs and contained sufficient criteria to measure the student's progress and attainment of the goals (id. at p. 45).

Based upon a review of the evidence, the IHO ultimately concluded that the district offered the student a FAPE for the 2010-11 school year (IHO Decision at p. 45).

Next, although not required, the IHO analyzed the appropriateness of the student's unilateral placement at Landmark for the 2009-10 and 2010-11 school years (IHO Decision at pp. 45-48). The IHO concluded that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement because the evidence revealed that Landmark was too restrictive and deprived the student of the benefits of attending school with her nondisabled

peers (id. at p. 45). The IHO found that Landmark only served students with disabilities, that the student's opportunity to interact with nondisabled peers occurred through very limited contact during extracurricular activities (such as athletics, volunteer programs, or community service), and that the evidence did not demonstrate that the student's needs required placement in a residential setting far from the student's home to enable her to receive educational benefits (see id. at pp. 47-48). As for equitable considerations, the IHO determined that although the parent at times, "aggressively advocate[ed] for [the student] and not always with an open mind," nevertheless, she fully participated in the process, and a reduction or denial of tuition reimbursement on equitable grounds would not be warranted (id. at pp. 48-49). The IHO, thus, dismissed the parent's due process complaint notice in its entirety.

IV. Appeal for State-Level Review

The parent appeals, and alleges that the IHO erred in concluding that the district offered the student a FAPE for the 2009-10 and 2010-11 school years. The parent argues that for the 2009-10 school year—"[a]s set forth in more detail in the accompanying memorandum of law"—the district "ignored the recommendations of its own evaluators" and the student's teachers at Landmark; the "public school placement is inconsistent with [the student's] established special needs;" the "public school placement is overly restrictive;" and the district failed to "address" the student's "social and emotional needs" (Pet. ¶¶ 83-84). With respect to the 2010-11 school year, the parent asserts—"[a]s set forth in more detail in the accompanying memorandum of law"—that the district "ignored the recommendations of its own evaluators" and the student's teachers at Landmark; the "public school placement is inconsistent with [the student's] established special needs;" the "public school placement is overly restrictive;" and the district failed to "address" the student's "social and emotional needs" (Pet. ¶¶ 85-86).

Next, the parent contends that the IHO erred in concluding that Landmark was overly restrictive. As relief, the parent seeks findings that the district failed to offer the student a FAPE for the 2009-10 and 2010-11 school years and that Landmark was an appropriate placement. In addition, the parent requests reimbursement for the costs of the student's tuition and related expenses at Landmark for the 2009-10 and 2010-11 school years, including transportation.

In its answer, the district responds to the parent's allegations with admissions and denials. The district asserts that the IHO properly concluded that the district offered the student a FAPE for the 2009-10 and 2010-11 school years, that Landmark was not an appropriate placement, and that the parent was not entitled to reimbursement for the costs of the student's tuition at Landmark for the 2009-10 and 2010-11 school years. The district seeks to uphold the IHO's decision in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic,

developmental, and functional needs'" of the student), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d at 1215; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1)

whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[20]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Procedural Matters: Sufficiency of Petition

As noted at the outset of this decision, State regulation requires a party appealing to an SRO to "clearly indicate the reason for challenging the [IHO's] decision" and to identify the findings, conclusions, and orders of the IHO with which the party disagrees in its petition for review (see 8 NYCRR 279.4[a]). State Review Officers have exercised their discretion and dismissed petitions that failed to comply with 8 NYCRR 279.4(a) (see e.g. Application of a Student

[20] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

with a Disability, Appeal No. 09-110; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024).

In the petition, the parent asserts that the IHO "erred in finding the 2009/10 program to be appropriate," the IHO "erred in finding the 2010/11 program appropriate," and the IHO "erred in finding Landmark to be overly restrictive" (Pet. ¶¶ 83, 85, 87). To support both allegations that the IHO erred in finding the 2009-10 and 2010-11 programs appropriate, the parent references her accompanying memorandum of law, which "set[s] forth in more detail" that the "school district ignored the recommendations of its own evaluators and [the student's] teachers; the public school placement [was] inconsistent with [the student's] established special needs; the public school placement [was] overly restrictive; and the school district failed to address [the student's] social and emotional needs" (Pet. ¶¶ 84, 86). With respect to the parent's assertion in the petition that the IHO erred in finding Landmark overly restrictive, the parent does not further particularize this argument either in the petition or by directing attention to her accompanying memorandum of law (Pet. ¶¶ 87-89). Generalized or conclusory assertions in a petition for review that an IHO's overall determination was incorrect, against the weight of the evidence, or blanket challenges to specific factual determinations are not sufficient under Part 279 and a State Review Officer is not required to infer from the pleadings, which of the IHO's "findings, conclusions and orders to which exceptions are taken" by party appealing or cross-appealing an IHO's decision (8 NYCRR 279.4[a]), and I am not required to simply presume that every last factual finding, or legal conclusion, in the IHO's decision was incorrect and unsupported by the evidence (Application of a Student with a Disability, Appeal No. 11-110). The purpose of the review is not to simply turn back the clock and start the whole proceeding anew.

In this case, the parent's assertions in the petition for review are unduly vague and ambiguous, lack any particularity, and fail to identify why the parent has challenged the IHO's decision, which precludes a meaningful review, and therefore, I will exercise my discretion to dismiss the petition for failing to comply with the regulations (see Application of a Student with a Disability, Appeal No. 11-110 [exercising discretion and declining to dismiss the petition despite the "generalized and conclusory assertions" that the IHO's determination was "incorrect"]; Application of the Bd. of Educ., Appeal No. 11-088 [dismissing cross-appeal for failure to allege "particulars as to the reasons" why the party challenged the IHO's decision, which precluded a "meaningful review"]; Application of the Dep't of Educ., Appeal No. 11-035 [dismissing cross-appeal for failure to allege "any particular findings" of the IHO that was either in error or not addressed]; Application of a Child with a Disability, Appeal No. 07-139 [exercising discretion and declining to dismiss petition that "merely restate[d]" the allegations in the amended due process complaint notice, but reminding petitioner's attorney to comply with regulations in the future]; Application of a Child with a Disability, Appeal No. 07-112 [dismissing petition based upon "vague and ambiguous" statements, which precluded "meaningful review"]). While this was a long and complex proceeding, the limitations placed on pleadings are not at issue insofar as the petition was little more than half of the length permitted by State regulations (8 NYCRR 279.8[a][5]; see Application of a Student with a Disability, Appeal No. 08-003).

In addition, I note that although the parent submitted a memorandum of law in support of the petition, the memorandum of law does not cure the parent's failure to comply with 8 NYCRR 279.4(a), and it is not a substitute for either a pleading or a properly drafted petition for review (see 8 NYCRR 279.4, 279.6 [noting that State regulations direct that "[n]o pleading other than the

petition or answer will be accepted or considered by a State Review Officer except a reply by the petition to the answer"]; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). Notably, a review of the memorandum of law submitted by the parent in support of her petition offers no further clarification or identification of which of the IHO's "findings, conclusions and orders" to which exceptions are taken" by the parent on appeal, because it is nearly identical to the post-hearing brief submitted to the IHO on the parent's behalf after the conclusion of the impartial hearing (compare Parent Mem. of Law at pp. 1-22, with IHO Ex. i at pp. 8-26). Distinctions between the parent's memorandum of law in support of the petition and her post-hearing brief to the IHO are essentially limited to not including the statement of facts or the relief requested in the parent's post-hearing brief (compare Parent Mem. of Law at p. 1, 21-22, with IHO Ex. i at pp. 1-8, 26-27).

Nevertheless, I have reviewed the entire hearing record, and I will offer discussion regarding the merits of the underlying proceeding by relying upon the arguments asserted in more detail in the accompanying memorandum of law, as referenced by the parent's petition. Based upon an independent review and as discussed more fully below, I find that the parent's argument that the district failed to offer the student a FAPE is without merit and must be dismissed.

B. The 2009-10 IEP

Although the IHO rendered distinct findings with regard to each school year at issue, the parent's memorandum of law merges the discussion of the issues for both school years together. With regard to the 2009-10 IEP, the parent's memorandum of law contains the four sections described below.

1. The District Disregarded the Recommendations of the Student's Teachers and Its Own Evaluators in Recommending a Public School Placement.

Here, the parent initially contends in her memorandum of law that an "appropriate program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals and short-term instructional objectives related to those needs, and provides for the use of appropriate special education services," and thus, the district's failure "to comply with the requirement that an IEP be based upon 'the results of evaluations to identify the student's needs'" denied the student a FAPE for the 2009-10 school year (Parent Mem. of Law at pp. 6-8).

While it is undisputed that the district did not conduct its own formal evaluations of the student immediately prior to the May 2009 or June 2009 CSE meetings, the evidence does indicate that the 2009-10 IEP accurately identified the student's needs, established annual goals related to those needs, and provided for the use of appropriate special education services in compliance with the district's obligations, and moreover—as the IHO properly concluded in her decision—the student's 2009-10 IEP was consistent with the findings reported in the student's most recent 2007 neuropsychological evaluation report and 2007 speech-language evaluation report (see IHO Decision at p. 15-16; compare Dist. Ex. 9 at pp. 2-3, with Dist. Ex. 12 at pp. 1, 3-7, and Dist. Ex. 13 at pp. 1-2, 7-9).[21] In addition, the hearing record reveals that the district prepared a draft IEP

[21] According to the hearing record, the 2007 neuropsychological evaluation report and 2007 speech-language evaluation reports were the subject of lengthy discussions over the course of three CSE meetings on December

for the May 2009 CSE meeting, which contained specific information derived directly from the student's most recent April 2009 Landmark progress reports (compare Parent Ex. E at pp. 1-2, with Dist. Ex. 24 at pp. 24 at pp. 1-4, 6-7). According to the committee information in the May 2009 IEP, the CSE convened for approximately 90 minutes, during which time the Landmark teachers who participated in the meeting provided information about the student's academic skills, and the parent questioned district staff about the "techniques and strategies they would use to teach [the student]" (Dist. Ex. 8 at p. 9; see Parent Ex. EEEEE at pp. 2-3). However, the May 2009 CSE determined that additional review was needed, and agreed to reconvene another meeting (Tr. pp. 1185, 1887-88, 1190-91, 1908; Dist. Ex. 8 at p. 9; see Tr. pp. 1876-77, 1897-98; Parent Ex. EEEEE at pp. 2-3).

On June 5, 2009 the CSE reconvened, and the CSE chairperson opened the meeting by stating that since the CSE had not received any "new information" about the student to indicate that the student required a placement other than the district, the CSE would recommend placing her in the district for the 2009-10 school year in a resource room setting as the student's LRE (see Parent Ex. EEEEE at pp. 1-7). She also stated, however, that she welcomed additional discussions, a further review of the student's work samples, and more information about the student from the Landmark teachers (id. at pp. 2, 5). The CSE chairperson indicated that the June 2009 draft IEP contained annual goals that she drafted based upon the student's work samples, as well as information about the student's strengths and weaknesses; the CSE proceeded to review the proposed annual goals (id. at p. 7-8, 17-21; compare Parent Ex. D at pp. 17-19, with Parent Ex. E at pp. 17). Throughout the review of the annual goals, the Landmark teachers commented on some of the proposed annual goals, and the CSE discussed the appropriateness of the annual goals depending upon whether the goals would be implemented at Landmark or in the district's program (see Parent Ex. EEEEE at pp. 17-21). In addition, the Landmark teachers provided details about the student's needs in the classroom and the types of supports provided to her in the Landmark classrooms, which district CSE members indicated could be replicated in the district's program (see id. at pp. 16-24, 27).

The Landmark teachers also discussed their concerns at the June 2009 CSE meeting about the type and amount of classroom supports that would be provided to the student in the placement initially recommended by the CSE: general education with resource room (see Parent Ex. EEEEE at pp. 6, 12, 23-24). According to the written transcript of the June 2009 CSE meeting, the district's regular education teacher and special education teacher described specific strategies they incorporated into their instruction in the general education, inclusion class, and resource room settings (see id. at pp. 11-15, 21-23). In addition, the June 2009 CSE discussed the student's needs with her Landmark teachers and considered placement options, such as general education with resource room and an inclusion setting with a daily 1:1 tutorial (see id. at pp. 12-14, 24-28, 31-32). Near the conclusion of the meeting, the CSE chairperson stated that for the 2009-10 school year, the CSE recommended placing the student in an inclusion setting for her English,

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12, 2007, January 15, 2008, and May 6, 2008, which resulted in the addition of two accommodations to the student's IEP—preferential seating and the provision of study guides—to address the student's identified areas of weakness in short-term memory and word retrieval (see Dist. Exs. 4 at pp. 1, 7-8; 5 at pp. 1, 7-8; 6 at pp. 1, 7-8; compare Dist. Ex. 5 at pp. 2-3, with Dist. Ex. 6 at pp. 2-3). In addition, both the 2007 neuropsychological evaluation report and the 2007 speech-language evaluation report—as well as the CSE meetings convened to review these reports—were also discussed at length in Application of a Student with a Disability, Appeal No. 09-088 (see Dist. Ex. 66 at pp. 6-11, 13-14).

mathematics, social studies, science, and science lab classes, with a daily 1:1 tutorial (see id. at p. 33).

As a result of the May and June 2009 CSE meetings, a review of the student's finalized 2009-10 IEP indicates that the student exhibited educational strengths in visual memory, nonverbal reasoning skills, spelling, word attack skills, listening comprehension, acceptance of constructive criticism, and implementation of suggestions to improve work (Dist. Ex. 9 at p. 3). The present levels of performance described in detail the student's specific skills in the areas of written and spoken language, and the student's relative weaknesses in the areas of working memory, cognitive flexibility, and reading fluency (id.). Although in general the student did not demonstrate difficulty with language production or understanding, she did exhibit word retrieval difficulties (id.). Regarding the student's academic needs, the IEP identified that the student needed to improve her ability to take notes and to improve her written expression by developing her ability to generate an idea, organize her thoughts, weed out irrelevant words and phrases, use transition words, and use grade-appropriate vocabulary (id. at pp. 3-4). In writing, the student needed teacher guidance, and the use of graphic organizers or templates, prewriting activities, brainstorming or discussion, role-playing, and audiovisual aides to organize her thoughts (id.). She also needed strategies to help her elaborate her ideas, guided questions to aide in her comprehension, and to improve her proofreading skills (id. at p. 4). The IEP included testing accommodations required by the student (id.). In addition, the finalized 2009-10 IEP described the student's social/emotional and physical levels and abilities as within age-appropriate expectations, and thus, the CSE determined that she did not require special education services to address any social/emotional needs at that time (see Dist. Ex. 9 at p. 7). The IEP contained a transition plan indicating the student's interest in attending a four year college and living independently following college graduation, and identified specific transition activities to assist the student in reaching the annual transition goals (id. at pp. 7-8, 17).

Therefore, contrary to the parent's argument, I find that the student's 2009-10 IEP accurately identified the student's needs, established annual goals related to those needs, and provided for the use of appropriate special education services, and the parent's argument is without merit and must be dismissed.

Next, the parent asserts in her memorandum of law that the district denied the student a FAPE for the 2009-10 school year because the "district staff . . . ignored the recommendations of those who knew [the student] in favor of a predetermined placement in the [district's] public school" (Parent Mem. of Law at pp. 6-8). In particular, the parent asserts that the district ignored recommendations to place the student in a "small class environment," or more specifically, at Landmark, for the 2009-10 school year (see id. at pp. 6-7). In support of her argument, the parent relies primarily on testimonial evidence adduced at the impartial hearing by the student's case manager at Landmark who participated in the May and June 2009 CSE meetings, the student's grammar and composition teacher at Landmark who participated in the May 2009 CSE meeting, and two other teachers at Landmark who taught the student (see id. at p. 7). In addition, the parent relies upon a recommendation found in a 2007 speech-language evaluation report, which indicated that the student should continue to be placed at Landmark because the student was "receiving excellent support and services and ha[d] shown progress" (id.; see Dist. Ex. 13 at p. 9).

First, it must be noted that a review of the hearing record reveals that two of the student's Landmark teachers referenced in the parent's memorandum of law in support of their argument did not participate in any way in the development of the student's 2009-10 IEP; thus, to the extent that

the parent contends that their views were ignored with regard to what each considered to be an appropriate placement—such as a small class setting or, in particular, placement at Landmark for the 2009-10 school year—there testimony was not relevant and does not support the parent's assertion that their views were ignored (see Dist. Exs. 8 at p. 8; 9 at p. 8; 60 at pp. 2, 4; Parent Ex. EEEEE at pp. 1-37).[22]

With respect to the student's case manager and the student's grammar and composition teacher at Landmark, the hearing record indicates that while they both participated in the development of the student's 2009-10 IEP, I am not persuaded that the evidence in the hearing record sufficiently demonstrates that either individual expressed an opinion at either the May or June 2009 CSE meetings that the student required a small class setting, or in particular, to be placed at Landmark, for the 2009-10 school year (see Tr. pp. 1153, 1166, 1215-17, 1862-63, 1884; Parent Ex. EEEEE at pp. 1-37).[23] In particular, the student's grammar and composition teacher—who participated only at the May 2009 CSE meeting—testified that she recalled "being asked to compare the student to a public school student," but did not "really remember much else" about the meeting (Tr. p. 1869). After refreshing her recollection of the May 2009 CSE meeting, the student's grammar and composition teacher testified that although she recalled the "student in class . . . all of these teachers and . . . our comments about her," she was "still not clear on the specifics of the meeting" (Tr. pp. 1870-72). The grammar and composition teacher recalled answering questions posed to her at the May 2009 CSE meeting, but did not recall that the meeting resulted in "any particular outcome" (Tr. pp. 1872-74, 1876). In reviewing the comments section of the May 2009 draft IEP, the grammar and composition teacher testified that her remarks—as captured in the draft—accurately represented the information she provided to the May 2009 CSE about the student (Tr. p. 1876; Dist. Ex. 29 at p. 3). However, when asked at the impartial hearing if she had an opinion regarding what the student required for the 2009-10 school year "in order to achieve educational benefit," the grammar and composition teacher testified that she continued to need "what I was providing that year; a small group instruction with very explicit skill-based instruction" and to be in a "place that had small groups; that . . . focused on not so much the contents but the delivery of the contents" (Tr. pp. 1883-84). Notably, however, the grammar and composition teacher was not directly asked at the impartial hearing if she expressed these opinions at the May 2009 CSE meeting (see Tr. pp. 1860-99). And to the extent that she did recall the opinions expressed by the district CSE members participating in the meeting about the student's needs, she testified that "they seemed to say they could provide a similar thing that I provided," but further opined that "it was questionable as to how that would happen" (Tr. pp. 1884-85).

[22] Certainly, however, the testimony provided by these two teachers at the impartial hearing may be relevant to the parent's burden to establish whether the student's unilateral placement at Landmark for the 2009-10 and 2010-11 school year was appropriate.

[23] Although the hearing record does not contain a written transcript of the May 7, 2009 CSE meeting, the parent does not otherwise cite to or point to any other evidence to establish that the Landmark teachers who participated in the May 2009 CSE meeting recommended that the student should be placed at Landmark for the 2009-10 school year during the May 2009 CSE meeting (see Tr. pp. 1185-91,1862-63, 1873-77, 1884, 1897-98). Moreover, the hearing record indicates that the May 2009 CSE did not reach the a decision about the student's recommended placement; consequently, the student's annual review continued at the June 2009 CSE meeting, which ultimately resulted in the CSE's recommendation to place the student in an inclusion setting with a 1:1 tutorial (see Dist. Exs. 8 at p. 1-2, 9; 9 at pp. 1-2, 8-9; see also Tr. pp. 1876-77).

With respect to the student's case manager who participated in both the May and June 2009 CSE meetings, her testimony about the May 2009 CSE meeting does not indicate that she expressed any opinion regarding whether the student required a small class environment, or to be placed at Landmark, for the 2009-10 school year (see Tr. pp. 1184-91 [noting that the May 2009 CSE meeting concluded without any specific recommendation regarding the student's placement for the 2009-10 school year]). Turning to the June 2009 CSE meeting, the student's case manager testified that she recalled an "adversarial" start to the meeting, providing the district with the student's progress reports and work samples, and discussing the proposed annual goals in the draft IEP, but that she did not believe that the student's 2009-10 IEP had been "finalized" at that meeting (see Tr. pp. 1191-96). The student's case manager also testified that she recalled the district special education teacher discussing the student's placement in either an inclusion program or resource room program, and that early in the June 2009 CSE meeting, she understood that the district was recommending a resource room program as the student's placement in the LRE (see Tr. pp. 1196-98). When asked if the Landmark staff attending the June 2009 CSE meeting expressed or communicated any opinions about an appropriate recommendation for the student, the case manager testified that she thought the Landmark teachers were "recommending the small class environment and, obviously, the instruction [the student] was getting at Landmark" (Tr. p. 1198).

However, a review of the written transcript of the June 2009 CSE meeting weighs against the case manager's recollections (see Parent Ex. EEEEE at pp. 1-37). In particular, a review of the her comments, and the comments of the other Landmark teachers', at the June 2009 CSE meeting reveals that when they did participate, none of the Landmark participants expressed an opinion that the student required either a small class environment or to be placed at Landmark for the 2009-10 school year (see id. at pp. 15-24, 26-29, 34). Instead, the Landmark participants answered questions posed by the CSE, and discussing the proposed annual goals for the student (see id.). In addition, when the CSE chairperson stated near the conclusion of the meeting that the district recommended an inclusion program for the student with a 1:1 tutorial, none of the Landmark participants expressed any opinions about, or disagreements with, the recommendation (see id. at pp. 33-35).

In addition, a review of the April 2009 Landmark progress reports and the student's second quarter report cards—which the May 2009 CSE considered and reviewed during a 90-minute meeting—are also devoid of any recommendations for placing the student in either a small class setting or, in particular, Landmark for the 2009-10 school year (see Dist. Exs. 23-24).

With respect to the recommendation for the student to continue to attend Landmark as set forth in the 2007 speech-language evaluation report, the hearing record is unclear whether—or to what extent—the May 2009 CSE considered the evaluation report, and it does not appear from the written transcript of the June 2009 CSE meeting that the 2007 evaluation report arose in particular as one of the topics of discussion (see Dist. Ex. 8-9; Parent Ex. EEEEE at pp. 1-37). However, a review of the June 2009 IEP demonstrates that although the CSE did not ultimately recommend placing the student at Landmark, the 2009-10 IEP incorporated many of the recommendations from the 2007 speech-language evaluation report into the IEP (compare Dist. Ex. 13 at p. 9, with Dist. Ex. 9 at pp. 2-3). Thus, based upon the foregoing, I find that the hearing record does not support the parent's assertion that the district ignored the recommendations of either the student's case manager or teachers at Landmark or as set forth in the 2007 speech-language evaluation report in recommending a public school placement for the 2009-10 school year.

Turning to the parent's allegation that the district predetermined the student's placement in the district for 2009-10 school year, I note that the consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Based upon a review of the entire June 2009 CSE meeting transcript—documenting the second 90-minute CSE meeting convened to develop the student's 2009-10 IEP—I find that the CSE chairperson's remarks at the beginning of the June 2009 CSE meeting, alone, are insufficient to find that the district impermissibly predetermined the student's 2009-10 IEP program or placement. While I do not condone the CSE chairperson's statements and while such remarks do not lend themselves to the collaborative process envisioned by the IDEA to develop a student's IEP, the written transcript of the June 2009 CSE meeting indicates that the CSE chairperson regained her composure, refocused the meeting, and that the meeting proceeded—with the active participation of the parent and the Landmark participants—to review the student's annual goals, to further discuss the supports and services needed by the student to receive educational benefits in a district program, and to discuss the CSE's recommendation to place the student in an inclusion setting with a daily 1:1 tutorial, which arose—as the IHO properly indicated in her decision—as a result of the continued participation of the Landmark teachers and case manager and the additional information they provided about the student's needs (see Parent Ex. EEEEE at pp. 1-37; IHO Decision at pp. 18-19). Given this evidence, I cannot conclude that the district failed to consider the recommendations of the evaluators or the Landmark participants in recommending a public school placement, and the parent's claim must be dismissed.

2. The District's Public School Placement is Fundamentally Inconsistent with the Student's Established Special Needs

With respect to the 2009-10 school year, the parent primarily argues in her memorandum of law that the district ignored the "nearly universal recommendation" by the evaluators and the student's Landmark teachers and case manager that the student required a "small class" to meet her special education needs, and further, that the annual goals were not consistent with the student's needs (see Parent Mem. of Law at pp. 8-10). A review of the hearing record reveals, however, that the student's case manager at Landmark and the student's grammar and composition teacher at Landmark who participated in either the May 2009 or June 2009 CSE meetings—as discussed at length above—did not recommend or opine that the student required a small class size to meet her needs, but rather, the evidence indicates that the Landmark participants described how the

small class sizes at Landmark benefitted her, and questioned how the classroom supports available in the district's recommended program would meet the student's needs within that program (see Parent Ex. EEEEE at pp. 23-24, 29; see also Tr. pp. 1185-91, 1869-77, 1884-85).[24] Next, although the parent relies on the testimony of the speech-language pathologist who conducted the 2007 speech-language evaluation recommending a small class size for the student, the hearing record shows that the speech-language pathologist did not participate in either the May 2009 or June 2009 CSE meetings to develop the student's 2009-10 IEP, and as stated above, it is unclear the extent to which the 2007 speech-language evaluation report was considered by either the May or June 2009 CSEs (see Parent Ex. EEEEE at pp. 1-37; see also Dist. Exs. 8 at pp. 8-9; 9 at p. 8; 60 at pp. 1-4).

Next, the parent asserts in the memorandum of law that the annual goals were inconsistent with the student's needs and that Landmark participants informed the district about the inconsistencies at the May and June 2009 CSE meetings. First, the draft IEP prepared for the May 2009 CSE meeting did not include any annual goals, and the hearing record does not otherwise indicate that the May 2009 CSE discussed the student's annual goals at that meeting (see Parent Ex. E at p. 1, 17). Second, the draft IEP prepared for the June 2009 CSE meeting contained proposed annual goals in the areas of study skills, writing, and career/vocation/transition (see Parent Ex. D at pp. 17-19). According to the written transcript of the June 2009 CSE meeting, the Landmark participants questioned and commented about some of the proposed annual goals regarding the type of instruction the student would receive in the district's program in order to achieve the goals; that the student had achieved some of the annual goals in the Landmark setting; that a specific instructional technique within the study skills annual goals would not be effective with the student; that the annual goals required specific benchmarks; that the IEP lacked an annual goal to help the student scaffold information to increase her comprehension skills; and that the IEP lacked specificity in the goals regarding the amount of teacher assistance required by the student (see Parent Ex. EEEEE at pp. 17-21).

In response to the concerns expressed by the Landmark participants, the June 2009 CSE chairperson indicated that while the student may have achieved some of the annual study skills goals with support at Landmark, it was not clear the student could achieve the same goal in the district's "mainstream setting," and she had concerns about the student's skills transferring from one setting to another without support (see Parent Ex. EEEEE at pp. 18-19). In addition, the CSE chairperson offered to incorporate any annual goals that the Landmark teachers had developed for the student into the 2009-10 IEP, if the Landmark teachers were willing to share those with the district (see id. at p. 20). A careful comparison of the 2009-10 draft IEP with the student's finalized 2009-10 IEP reveals that although many of the annual goals remained the same after the June 2009 CSE meeting, some of the annual goals in the finalized 2009-10 IEP had been modified to

[24] I note that the parent's memorandum of law, she cites to the testimony adduced at the impartial hearing by three teachers at Landmark and the student's case manager to support the proposition that the Landmark participants recommended a small class setting for the student for the 2009-10 school year (see Parent Mem. of Law at p. 8). However, as previously noted, only the student's case manager and the student's grammar and composition teacher participated in the May or June 2009 CSE meetings, and therefore, the testimony by the two additional teachers referenced in the memorandum of law is irrelevant to the instant analysis (see Dist. Exs. 8 at p. 8; 9 at p. 8; 60 at pp. 2, 4; Parent Ex. EEEEE at pp. 1-37).

incorporate the comments made by the Landmark participants at the June 2009 CSE meeting (compare Dist. Ex. 9 at pp. 15-16, with Parent Ex. D at pp. 17-18).[25]

3. The District's Program, Which Features Substantial Pull-Outs for One-to-One Services, is Overly Restrictive.

The parent contends in her memorandum of law that the daily 1:1 tutorial recommended as part of the student's 2009-10 IEP violates the IDEA's strong preference to educate students with disabilities, to the "maximum extent appropriate," alongside their nondisabled peers (see Parent Mem. of Law at pp. 10-11). In support of her argument, the parent asserts that the district ignored the student's Landmark teachers, who noted that the student did not require 1:1 instruction (id. at p. 11). However, based upon a review of the written transcript of the June 2009 CSE meeting, the evidence reveals—as properly noted by the IHO in the decision—that the district recommended the daily 1:1 tutorial to provide the student with additional structural supports as she transitioned into the less restrictive inclusion class in the district (see Parent EEEEE at pp. 23-27, 31-32; IHO Decision at p. 22). Therefore, although the student would receive the daily 1:1 tutorial session separate from her nondisabled peers, it is only one component of the student's recommended special education program—and, in fact, it was the only period of the school day that the student would be separated from her nondisabled peers—and as such, it does not constitute a violation of the LRE to the extent that it would deprive the student of a FAPE.

4. The District Failed to Address the Student's Social/Emotional Needs Transitioning into a Public School Program

While the majority of parent's argument in her memorandum of law on this issue refers to the student's transition and social/emotional needs for the 2010-11 school year, the parent's memorandum of law—broadly construed—could be interpreted to level the same allegations with respect to the 2009-10 school year (see Parent Mem. of Law at pp. 11-13 [noting that the district "provided nothing on either the 2009/10 or 2010/11 IEPs to address these needs"]). A review of the hearing record indicates, however, that the parent's argument is without merit and must be dismissed.

According to the April 2009 Landmark progress reports available at the time of the May and June 2009 CSE meetings, the student took on a leadership role, maintained a polite and respectful attitude, and actively participated in class; she was comfortable asking questions and taking risks; she was courteous, helpful, and always had a positive attitude; and she self-advocated and asked for clarification when needed (see Dist. Ex. 24 at pp. 1-4, 6-7). The residential life report indicated that the student applied all skills measured independently, and the student was "consistently enthusiastic, involved, considerate of others" and that she shared her "positive energy and leadership skills with her peers" (id. at p. 10). The residential life report also noted that the student had improved her ability to advocate for herself in the area of social "issues" and that she exhibited a very good ability to manage and balance her residential and academic responsibilities

[25] Although the student's Landmark geometry teacher opined at the June 2009 CSE meeting that the student required "goals for every course," the evaluative data before the CSE did not indicate areas of need in subjects such as mathematics that would require annual goals and supports beyond what would have been provided by the consultant teacher direct services and the 1:1 tutorial services recommended by the district (see Dist. Ex. 9 at pp. 1-2, 4-6).

(id.). Notably absent in the April 2009 Landmark progress reports are any indications that Landmark staff had any concerns about the student's social/emotional status (id. at pp. 1-7; see Dist. Ex. 9 at pp. 8-9).

In addition, while the hearing record does not indicate if, or to what extent, the May 2009 CSE discussed the student's social/emotional needs, the hearing record does indicate that the district's school psychologist acknowledged at the June 2009 CSE meeting that the student did not need goals to address social/emotional difficulties at Landmark because "it's not as much of an issue" in that setting (see Tr. pp. 1185-91, 1869-74; Dist. Ex. 9 at pp. 8-9; Parent Ex. EEEEE at p. 28). The school psychologist also stated that the CSE would need to consider what goals would be appropriate for the student entering a different setting, such as a district placement (see Parent Ex. EEEEE at pp. 28-29). In this context, the June 2009 CSE continued to discuss the restrictive nature of Landmark, and the amount of supports the district provided to the student within the inclusion classes and the daily 1:1 tutorial (see id. at pp. 28-29, 31-32). As reported in the 2009-10 IEP, the student's social/emotional levels and abilities were within age-appropriate expectations, and thus, there were no social/emotional needs that required special education intervention at that time (see Dist. Ex. 9 at p. 7). In addition, discussions at the June 2009 CSE meeting reveal that the district's recommendation for consultant teacher direct services in all academic classes with a daily 1:1 tutorial was specifically recommended to provide the student with supports to ease her transition into the district's less restrictive setting (see Parent Ex. EEEEE at pp. 31-32). Therefore, based upon this evidence, I am not persuaded that the student exhibited any social/emotional needs at the time the district developed the student's 2009-10 IEP that required the provision of special education programs or related services, and thus, the parent's argument must be dismissed.

C. The 2010-11 IEP

Turning to the 2010-11 IEP, as described above, the parent's memorandum of law contained the following four sections:

1. The District Disregarded the Recommendations of the Student's Teachers and Its Own Evaluators in Recommending a Public School Placement

Here—similar to the arguments asserted regarding the development of the student's 2009-10 IEP—the parent initially contends in her memorandum of law that an "appropriate program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals and short-term instructional objectives related to those needs, and provides for the use of appropriate special education services," and thus, the district's failure "to comply with the requirement that an IEP be based upon 'the results of evaluations to identify the student's needs'" denied the student a FAPE for the 2010-11 school year (Parent Mem. of Law at pp. 6-8).

Based upon a review of the hearing record and contrary to the parent's assertion, the evidence indicates that the student's 2010-11 IEP accurately identified the student's needs, established annual goals related to those needs, and provided for the use of appropriate special education services in compliance with the district's obligations, and moreover—as the IHO properly concluded in her decision—the student's 2010-11 IEP was consistent with the findings reported in the student's 2010 triennial reevaluation reports (see IHO Decision at pp. 23-33, 37-

43; compare Dist. Ex. 11 at pp. 1-5, 10-12, with Dist. Exs. 14-20). Notably, the hearing record reveals that the district convened CSE meetings on June 3, June 24, and July 23, 2010 to conduct the student's annual review and to develop her 2010-11 IEP (see Dist. Exs. 10A-11; Parent Exs. DDDDD at pp. 1-52; KKKKK at pp. 1-90). On June 3, 2010 the CSE reviewed the student's most recent progress reports from Landmark, dated May 2010; the 2010 neuropsychological evaluation report; the 2010 speech-language evaluation report; recommendations from the 2010 audiological and auditory processing assessment report; the student's 2010 classroom observation at Landmark; and a portion of the 2010-11 draft IEP (see Dist. Exs. 10A at p. 10; 10B at p. 11; 15 at pp. 11-13; 16 at pp. 1-2; 17 at pp. 1-12; 18 at pp. 1-14; Parent Ex. KKKKK at p. 32).[26]

On June 24, 2010 the CSE reconvened (see Dist. Ex. 10B at p. 1). The CSE reviewed and discussed a proposed academic course, graduation, and Regents examination plan developed by the district guidance counselor; the remainder of the 2010-11 draft IEP, including the recommended testing accommodations, program modifications, and annual goals; the 2010 educational reevaluation report (with the evaluator who conducted the reevaluation); and the assistive technology evaluation report (with the evaluator who conducted the evaluation) (see Dist. Exs. 10B at pp. 10-11; 19 at pp. 1-5; 20 at pp. 1-13; 36 at pp. 1-2; 37 at pp. 2-14; Parent Ex. KKKKK at pp. 1-37, 58-79).[27] The CSE meeting continued with a review of the student's strengths and needs, discussions about the parent's concerns regarding the student's need for emotional support during the transition back into the district, and the proposed recommendation placing the student in inclusion classes with a daily 1:1 tutorial and speech-language therapy (see Dist. Ex. 10B at pp. 1-2, 11; Parent Exs. B at pp. 1-2; KKKKK at pp. 38-58, 80-89).

On July 23, 2010 the CSE reconvened (see Dist. Ex. 11 at p. 1). The CSE reviewed and discussed the 2010 audiological and auditory processing assessment report (with the evaluator who conducted the evaluation); the parent's concerns about the social/emotional difficulties the student may encounter if she returned to the district's recommended program; and the assistive technology and program modifications proposed in the 2010-11 draft IEP (see Dist. Ex. 11 at pp. 1-2, 11; Parent Ex. DDDDD at pp. 1-37, 48-49). In addition, the CSE continued its discussions about the student's recommended placement in inclusion classes with a daily 1:1 tutorial, and whether the student would benefit from the addition of counseling as a related service to the IEP (see Dist. Ex. 11 at p. 11; Parent Ex. DDDDD at pp. 37-47). Ultimately, the July 2010 CSE recommended placing the student in an 8:1 inclusion program for English, mathematics, social studies, science, and science lab; and for the student to receive a daily 1:1 tutorial for the 2010-11 school year (see Dist. Exs. 10A at pp. 1, 10; 10B at pp. 1, 10-11; 11 at pp. 1-2, 11-12; 60 at pp. 5-18; see also Parent Exs. CCCCC at pp. 1-37; DDDDD at pp. 1-52; KKKKK at pp. 1-90). In addition, the July 2010 CSE also recommended that the student receive daily 1:1 reading instruction in the classroom, and

[26] The hearing record does not include copies of the student's May 2010 progress reports from Landmark, which were used, in part, to develop the student's 2010-11 IEP (see Tr. pp. 1-2128; Dist. Exs. 1-66; Parent Exs. A-J; L-M; V-Z; AA-CC; GG-HH; JJ-PP; RR-ZZ; AAA-EEE; GGG; III-XXX; AAAA-ZZZZ; AAAAA-EEEEE; HHHHH-ZZZZZ; IHO Ex. i-iii).

[27] The CSE also reviewed and considered an addendum to the student's 2010 neuropsychological evaluation report, which indicated that the "current psychometric data d[id] not actually support the diagnoses of Reading Disorder and Disorder of Written Expression" (Dist. Ex. 18 at p. 15; see Dist. Ex. 10B at p. 11). The addendum also revised the student's diagnoses, indicating that both the reading disorder and disorder of written expression were "[i]n [r]emission" (Dist. Ex. 18 at p. 15).

one session per six-day cycle of small group speech-language therapy services in the therapy room (i.e., one session of speech-language therapy every six days) (see Dist. Ex. 11 at pp. 1-2, 11).

A review of the student's finalized 2010-11 IEP reflects that the student had received diagnoses of a learning disorder, a reading disorder, and a disorder of written expression, and she exhibited an auditory processing disorder, auditory and visual memory deficits, and short-term memory deficits that affected the student's reading fluency and learning (see Dist. Ex. 11 at p. 4). In the present levels of academic performance, the CSE described the student's general intellectual functioning as within the average range, noting a particular strength in processing speed (id.). In addition, the CSE indicated that the student exhibited "normal" attention and executive function; "average" phonological awareness and fluency; "average" academic skills across the board; "normal" visual constructive and visual spatial abilities; and "average" receptive language skills, expressive language skills, language content, language memory skills, and comprehension of complex language skills (id.). Based upon a review of the 2010 audiological and auditory processing assessment report, the CSE indicated in the IEP that the student's auditory decoding and memory deficits affected her ability to integrate more complex and lengthy auditory material, which required the incorporation of auditory processing strategies into her educational program (id. at pp. 4-5, 10). In addition, the CSE indicated in the IEP that the student's organizational skills affected her recall and memory and that the student's language processing deficits may affect her reading fluency and comprehension (id. at p. 5).

The CSE also reported on the finalized 2010-11 IEP that the student demonstrated "normal" social abilities with both peers and adults, and thus, the CSE did not identify any social/emotional needs requiring special education services at that time (Dist. Ex. 11 at p. 10). Present levels of physical development reflected that the student exhibited normal motor skills and normal hearing sensitivity in both ears (id.). In addition, the CSE included a transition plan in the IEP, indicating the student's interest in attending a four year college and living independently following college graduation, and identified specific transition activities to assist the student in transition planning (id. at pp. 10-11).

According to the hearing record, the parent received a copy of the student's finalized 2010-11 IEP on July 30, 2010 (see Dist. Ex. 2 at p. 5). By letter dated August 23, 2010, the parent rejected the district's recommended program and notified the district of her intention to unilaterally place the student at Landmark for the 2010-11 school year (see Parent Ex. GG at pp. 1-2). Nevertheless, the hearing record demonstrates that the district reconvened for a fourth CSE meeting on September 17, 2010, with the IEE evaluator present to review and consider the IEE evaluation report—which the district received from the parent on August 17, 2010 (see Dist. Exs. 21 at pp. 1-11; 47; Parent Ex. CCCCC at pp. 1-37).[28]

[28] The IEE evaluator conducted an emotional functioning and personality assessment of the student on July 3, 2010, generated a report on July 19, 2010, and met with the parent and the student on either July 19 or 22, 2010 to review the evaluation results and the report (see Tr. pp. 739-40; Dist. Ex. 21 at p. 1; Parent Ex. CCCCC at p. 11). At the September 17, 2010 CSE meeting, the IEE evaluator stated that with the exception of two minor "factual inaccuracies" in the IEE evaluation report that he corrected, no other changes were made to the report after July 22, 2010 (see Parent Ex. CCCCC at p. 11). The parent received the "finished" report on either August 12 or 13, 2010, and sent a copy of the report to the district on August 17, 2010 (see Dist. Exs. 47-48; Parent Ex. CCCCC at p. 12).

According to the IEE evaluation report, the evaluator administered the Rorschach Inkblot Test, the Thematic Apperception Test, and the Sentence Completion Test to the student, and the parent and the student both completed the Behavior Assessment System for Children, Second Edition (BASC-2) Parent Rating Scales-Adolescent and Self Report-Adolescent (see Dist. Ex. 21 at p. 3). At the September 2010 CSE meeting, the IEE evaluator stated that the data indicated that the student valued her education—which gave her a purpose in life—but that "that the likely precipitant for suicidal ideation, what would make [the student] suicidal, [was] if she face[d] academic challenges that she th[ought] [were] insurmountable" (Parent Ex. CCCCC at p. 5). Based upon his evaluation, the IEE evaluator diagnosed the student as having an adjustment disorder with depressed mood, which he described as a "maladaptive reaction to a current stressor" related to the possibility of her return to the district (Dist. Ex. 21 at p. 7; see Parent Ex. CCCCC at pp. 10, 13-14). The September 2010 CSE discussed the parent's concerns about the student's emotional response to the possibility of returning to the district, how the district could support the student, and the possibility of adding counseling as a related service to the 2010-11 IEP (see Parent Ex. CCCCC at pp. 19-32). Near the conclusion of the September 2010 CSE meeting, the CSE chairperson explained that the district's recommended placement with the additional supports offered the student a FAPE in the LRE, and moreover, she would add counseling as a related service on the student's 2010-11 IEP based upon the results of the IEE evaluation report if the parent wanted that service (id. at pp. 31-32). The parent expressed her disagreement with the CSE chairperson, and questioned why the district was ignoring the recommendations that the student remain at Landmark, as indicated in both the 2010 neuropsychological evaluation report and the IEE evaluation report (id. at pp. 32-36). The CSE chairperson continued to express the opinion, however, that the student could be educated within the district (see id. at p. 37). As a result of the September 2010 meeting, the CSE did not make any changes to the student's 2010-11 IEP finalized at the July 2010 CSE meeting (see Tr. pp. 450-51).

Therefore, based upon the foregoing and contrary to the parent's argument, I find that the student's 2010-11 IEP accurately identified the student's needs, established annual goals related to those needs, and provided for the use of appropriate special education services, and the parent's argument is without merit and must be dismissed.

Next, the parent asserts in her memorandum of law that the district denied the student a FAPE for the 2010-11 school year because the "district's staff disdained the recommendations of multiple evaluators who conducted numerous tests and spent extensive time with [the student], and who concurred with the recommendations of [the student's] teachers and case manager" that the student required, in particular, a "small class environment" or, more specifically, to be placed at Landmark for the 2010-11 school year (Parent Mem. of Law at pp. 6-7). In support of her argument, the parent relies primarily upon recommendations in two evaluation reports—the 2010 neuropsychological evaluation report and the IEE evaluation report—and the testimony adduced at the impartial hearing by the student's case manager at Landmark who participated in the June 3,

June 24, July 23, and September 17, 2010 CSE meetings, as well as the testimony provided by three teachers at Landmark who testified at the impartial hearing (id.).[29, 30]

Turning first to the parent's argument that the district ignored the evaluators' recommendations in their respective evaluation reports, initially I must note that the hearing record does not indicate the 2007 speech-language evaluation report was reviewed at any of the CSE meetings convened to develop the student's 2010-11 IEP—or that the CSEs were required to review the 2007 evaluation report—especially in light of the fact that the CSEs thoroughly reviewed and considered the most recent 2010 speech-language evaluation report and the 2010 audiological and auditory processing evaluation report in the development of the student's 2010-11 IEP (see Dist. Exs. 10A-11; 13; 15; 17). In addition, the hearing record also indicates that the speech-language pathologist who conducted the 2007 evaluation did not attend any of the CSE meetings convened to develop the student's 2010-11 IEP (see Parent Ex. CCCCC at pp. 1-37; DDDDD at pp. 1-52; KKKKK at pp. 1-90; see also Dist. Exs. 10A-11; 60 at 5-18).

Next, the parent argues that the district ignored the 2010 neuropsychological evaluation report, which included a recommendation that the student remain in a small class environment, such as Landmark (see Parent Mem. of Law at pp. 6-7). According to the evaluation report, the neuropsychologist recommended that the student needed, among other things, "to continue in a highly structured academic program designed specifically for learning disabled students"—referring unequivocally to Landmark's program—and the hearing record indicates that his recommendation was discussed at the July 2010 CSE meeting (Dist. Ex. 18 at pp. 6-7; see Parent Ex. DDDDD at p. 44). At the July 2010 CSE meeting, the parent opined that the district could not provide the student with the "particular program" described in the 2010 neuropsychological report, and the CSE chairperson explained the district's position: namely, that given the results of the student's most recent triennial reevaluations—which indicated that the majority of the student's skills fell within the average to above average range—the district could offer the student a FAPE in the LRE through the CSE's recommendation to place the student in the inclusion program with a daily 1:1 tutorial, daily 1:1 reading instruction, and speech-language therapy in a small group (see Parent Ex. DDDDD at pp. 45-47).[31]

Notably, however, in addition to the "structured program" recommended in the 2010 neuropsychological evaluation report, the neuropsychologist also recommended that the student receive reading instruction, writing instruction, and assistive technology supports, which the CSE

[29] For the 2010-11 school year, the hearing record identifies the student's case manager at Landmark as the only staff from Landmark who participated in the development of the student's 2010-11 IEP (Tr. pp. 1198-1207; Parent Ex. CCCCC at p. 1; DDDDD at p. 1; KKKKK at p. 1; see Tr. pp. 1173, 1198-1207, 1317, 1609-10, 1869-77). Thus, to the extent that the parent cites to the testimony at the impartial hearing provided by the student's grammar and composition teacher, as well as two additional teachers at Landmark to support her argument, their testimony is irrelevant to the instant analysis.

[30] To the extent that the parent cites to the 2010 IEE speech-language evaluation report in support of her argument, the district did not review or consider this particular IEE evaluation report during the development of the student's 2010-11 IEP (see Tr. pp. 451-53, 863-64).

[31] I note that at the June 24 and July 23, 2010 CSE meetings, the parent stated that "on paper," the district's recommended program looked "good" or "great," but that she questioned the district's ability to implement the recommended program (Parent Exs. DDDDD at pp. 46-47; KKKKK at pp. 42, 49).

incorporated into the student's 2010-11 IEP through the daily 1:1 tutorial, daily 1:1 reading instruction, and assistive technology supports, including books on CD, a laptop, Kurzweil software, Inspiration software, and Bookshare (compare Dist. Ex. 11 at pp. 1-3, with Dist. Ex. 18 at p. 6). Therefore, although the district did not accept the neuropsychologist's recommendation that the student remain at Landmark for the 2010-11 school year, the hearing record supports the IHO's finding that it was "reasonable" for the CSE not to follow this particular recommendation, as the evaluative data he obtained during his evaluation of the student did not support a finding that she required the level of restrictiveness provided in the Landmark program in order to receive educational benefits (see IHO Decision at p. 38; Dist. Ex. 18 at pp. 6-7, 15-16).

Next, the parent alleges that the district's failure to review the IEE evaluator's report prior to the commencement of the 2010-11 school year "effectively ignore[ed]" his recommendation that the student remain at Landmark (Parent Mem. of Law at p. 7). However, the hearing record establishes that the district first contacted the IEE evaluator on August 10, 2010 to discuss possible dates to convene a CSE meeting in order to review the IEE evaluation report, which the district did not receive from the parent until August 17, 2010 with the explicit instructions from the parent that the CSE chairperson could not share the report with "anyone" without the "prior written permission" of the parent (see Dist. Exs. 21; 47; Parent Ex. KKK at pp. 1-2). Moreover, the hearing record establishes that if the parent had been more forthcoming with the information that she and the student had already met with the IEE evaluator on either July 19 or 22, 2010, at the July 23, 2010 CSE meeting, then the results of the IEE evaluation report could have been considered at that time (see Tr. p. 1798; Dist. Exs. 21 at p. 1; 43; 51 at p. 3; 60 at pp. 15-18; Parent Ex. CCCCC at pp. 1, 11). Regardless of the parent's argument, however, and as properly determined by the IHO, the IEE evaluation report did not include a specific recommendation that the student remain at Landmark, and therefore, the district could not have ignored such recommendation (see Dist. Ex. 21 at pp. 7-9; IHO Decision at pp. 40-42).

Finally, the parent argues in her memorandum of law that the district ignored the recommendations of the student's case manager at Landmark—who was the only Landmark staff member to participate in the development of the student's 2010-11 IEP (see Parent Mem. of Law at pp. 6-7; Tr. pp. 1198-1207; Parent Ex. CCCCC at p. 1; DDDDD at p. 1; KKKKK at p. 1). A review of the written transcripts of the June 24 and July 23, 2010 CSE meetings reveals that the student's case manager did not express any opinions that the student should remain at Landmark for the 2010-11 school year, or that she expressed any disagreement with the special education program and related services recommended by the CSE for the student for the 2010-11 school year (see Parent Exs. DDDDD 1-52; KKKKK at pp. 1-90). Rather, the written transcript of the July 23, 2010 CSE meeting—as well as a review of the case manager's testimony at the impartial hearing—indicates that she explained to the 2010 CSEs how the student benefitted from Landmark's small class size, including that the student was more likely to advocate for herself and that her teachers would be more aware if the student became lost during a lesson in a smaller classroom (see Parent Ex. DDDDD at pp. 6, 11, 16; see also Tr. pp. 1198-1207 [testifying about her participation at the CSE meetings to develop the student's 2010-11 IEP]). To the extent that the case manager did testify about the district's recommended program and services for both the 2009-10 and 2010-11 school years, she opined at the impartial hearing that neither program addressed the student's needs as she perceived them (see Tr. pp. 1210-16). However, the case manager's testimony does not reflect that she expressed that opinion at any of the CSE meetings she attended to develop either the student's 2009-10 IEP or the student's 2010-11 IEP, and

furthermore, a review of the case manager's testimony at the impartial hearing reveals that she did not recall much specific information about the CSE meetings convened to develop the student's 2010-11 IEP without refreshing her recollection with documentary evidence (see Tr. pp. 1198-1207, 1210-11; see generally Tr. pp. 1151-1257).

2. The District's Public School Placement is Fundamentally Inconsistent with the Student's Established Needs.

With respect to the 2010-11 school year, the parent primarily argues in her memorandum of law that the district ignored the "nearly universal recommendation" by the evaluators and the student's Landmark teachers that the student required a "small class" to meet her special education needs, that the "presence of two adults during instruction would create problems for [the student] due to her auditory processing deficits," and that "Landmark staff stressed" that the student did not need restrictive 1:1 instruction (see Parent Mem. of Law at pp. 8-10).

Initially, a review of the hearing record reveals, however, that the student's case manager at Landmark who was the only Landmark staff member to participate in the development of the student's 2010-11 IEP, as discussed above, did not recommend or opine that the student required a small class size to meet her established needs at any of the CSE meetings to develop the student's 2010-11 IEP (see Parent Exs. CCCCC at pp. 1-37; DDDDD 1-52; KKKKK at pp. 1-90; see generally Tr. pp. 1151-1257). As noted above, to the extent that the parent relies upon the testimony at the impartial hearing by the speech-language pathologist who conducted the 2007 speech-language evaluation recommending a small class size for the student, the hearing record demonstrates that the speech-language pathologist did not participate in the development of the student's 2010-11 IEP, and further, it is unclear whether the 2010 CSEs convened to develop the student's 2010-111 IEP relied at all upon the 2007 speech-language evaluation report (see Parent Ex. CCCCC at pp. 1-37; DDDDD at pp. 1-52; KKKKK at pp. 1-90; see also Dist. Exs. 10A-11; 13; 15; 17; 60 at 5-18).

Next, I note that the CSE's recommended placement for the 2010-11 school year specifically incorporated direct consultant teacher support in all of the student's academic classes, and a daily 1:1 tutorial to provide the student with an opportunity to review any information she may have missed in the classroom as services to address the student's established needs (see Dist. Ex. 11 at pp. 1-2). Similarly, the student's 2010-11 IEP included program modifications to address the concern that the student may occasionally miss information in the inclusion classrooms, such as checking for understanding, providing the student with copies of class notes, breaking information down into smaller steps, providing preferential seating, and reteaching of materials (id. at p. 2). In addition, the CSE envisioned that the recommended small group speech-language therapy services would be "used to teach and monitor compensatory strategies to improve auditory decoding, dichotic listening, and short-term memory" and that the group therapy was recommended—as opposed to 1:1 speech-language therapy—to facilitate the carry-over of skills and generalization across settings, such as in the classroom (id.; see Parent Ex. DDDDD at pp. 5-13).

Turning to the evaluation reports relied upon by the parent in her memorandum of law, I note that although the 2010 neuropsychological evaluation report included a recommendation that the student be educated "in a setting with smaller class sizes alongside students with language-based disabilities throughout the school day," the neuropsychologist testified at the impartial

hearing that he had never observed a district high school classroom, and he had no familiarity with either the district's general education programs, inclusion programs, or special education supports (Tr. pp. 636-37; see Dist. Ex. 18 at p. 7). According to the hearing record, the district's typical inclusion classes consisted of a total of 24 to 28 students—which included no more than 8 students with disabilities—and was staffed with both a regular education teacher and a special education teacher (see Tr. pp. 549-50). According to the neuropsychologist, in order for the student to continue to "achieve at her current levels," she required placement in a classroom of less than 20 students with one teacher and an assistant (Tr. pp. 699-700). Notably, the IHO determined that the district's recommended inclusion placement was "not that far" from the classroom composition recommended by the neuropsychologist in his testimony, and given the neuropsychologist's lack of familiarity with any of the other services recommended by the district—such as the daily 1:1 tutorial, the daily 1:1 reading instruction, speech-language therapy, program modifications, and assistive technology to support the student's needs in the classroom—I agree with the IHO's conclusion that it was "reasonable" to not follow the neuropsychologist's particular recommendation that the student remain at Landmark for the 2010-11 school year (see IHO Decision at p. 38; see also Tr. p. 701). In addition, when asked what evidence supported the student's need for a small class size in order to make progress, the neuropsychologist admitted in testimony that he could not "predict with . . . certainty that [the student] require[d]" a small class size; however, based upon his "clinical judgment," he explained that the student required a small class "in order [for her] to keep up to the best of her ability" (Tr. pp. 680-81). The neuropsychologist also testified, however, that "all students"—specifically indicating both typically developing students and students with disabilities—benefitted from small class sizes (id.).

I now turn to the parent's allegation in her memorandum of law that the "presence of two adults during instruction would create a problem for [the student] due to her auditory processing deficits," as indicated by the testimony of the audiologist who conducted the 2010 audiological and auditory processing assessment evaluation of the student (Parent Mem. of Law at p. 9; see Tr. pp. 955-56, 974-75). Initially, the hearing record does not contain any evidence to support a conclusion that both the regular education teacher and the consultant teacher (special education teacher) in the district's recommended inclusion program would be consistently providing instruction to the student at the same time or that the teachers would talk to the student simultaneously (see Tr. pp. 1-2128; Dist. Exs. 1-66; Parent Exs. A-J; L-M; V-Z; AA-CC; GG-HH; JJ-PP; RR-ZZ; AAA-EEE; GGG; III-XXX; AAAA-ZZZZ; AAAAA-EEEEE; HHHHH-ZZZZZ; IHO Ex. i-iii). Nevertheless, the hearing record does indicate that the July 2010 CSE discussed the student's difficulty listening to two messages at the same time, and responded to this need by recommending numerous program modifications and testing accommodations to reduce the effect of this difficulty in the classroom (see Parent Ex. DDDDD at pp. 12-13; compare Dist. Ex. 15 at pp. 11-12, with Dist. Ex. 11 at p. 2). For example, both the audiologist and the July 2010 CSE recommended preferential seating, using graphics and visuals, checking for understanding and requesting verbal feedback to demonstrate her understanding, providing the student with copies of class notes, presenting information in small chunks and broken down into smaller steps, reteaching of information, and using organizational aides and planners, in addition to the testing accommodations of extended time, special location, and directions explained (compare Dist. Ex. 15 at pp. 11-13, with Dist. Ex. 11 at pp. 2-3). Furthermore, the July 2010 CSE recommended speech-language therapy specifically to improve the student's dichotic listening skills and to

improve the student's ability to listen to two different messages at the same time (see Dist. Exs. 11 at p. 2; 15 at p. 12).[32] As such, the parent's argument is without merit and must be dismissed.

Finally, the parent argues in her memorandum of law that the "Landmark staff stressed that [the student] d[id] not need restrictive [1:1] instruction," referring specifically to the district's recommendations for a daily 1:1 tutorial and daily 1:1 reading instruction in the student's 2010-11 IEP (Parent Mem. of Law at p. 9).[33] However, while I note that the student's case manager at Landmark advocated for the provision of in-class supports for the student—as opposed to the 1:1 pull-out situations to "rehash" material presented during class—the hearing record reflects that the purpose of the daily 1:1 tutorial was not to replicate the instruction the student received in each academic classroom, as suggested by the Landmark case manager, but rather, to provide additional support to the student in conjunction with the supports already provided by the consultant teacher and program modifications within the classroom to ease her transition back into the district (see Parent Exs. DDDDD at pp. 44-46; KKKKK at pp. 33, 36, 38, 41). In addition, I also note that at both the June 24 and the July 23, 2010 CSE meetings, the Landmark case manager indicated that the student required direct instruction in auditory processing and listening strategies to be used in the classroom, and in writing, research, and note taking, which were skills that could be addressed in the daily 1:1 tutorial (see Parent Exs. DDDDD at p. 16; KKKKK at p. 38). Additionally, the June 24, 2010 CSE chairperson stated at the meeting that the purpose of the daily 1:1 reading instruction was in response to the neuropsychologist's recommendation that the student receive specific reading instruction to improve her fluency (see Dist. Ex. 18 at p. 6; Parent Ex. KKKKK at p. 33).

3. The District's Program, Which Features Substantial Pull-Outs for One-to-One Services, is Overly Restrictive.

Here, the parent contends in her memorandum of law that in addition to the daily 1:1 tutorial recommended in the student's 2009-10 IEP, the district also recommended daily 1:1 reading instruction and pull-out speech-language therapy services as part of the student's recommended program for the 2010-11 school year, violating the IDEA's strong preference to educate students with disabilities, to the "maximum extent appropriate," alongside their nondisabled peers (see Parent Mem. of Law at pp. 10-11). In support of her argument, the parent asserts that the district ignored the student's Landmark teachers, who noted that the student did not require 1:1 instruction (id. at p. 11). However, based upon a review of the hearing record, the

[32] Although the parent argues that the speech-language pathologist who conducted the student's 2010 speech-language evaluation did not recommend speech-language therapy, the audiologist who conducted the 2010 audiological and auditory processing assessment recommended "[t]herapeutic intervention to teach compensatory strategies and to improve auditory skills" in the areas of auditory decoding, dichotic listening, and short-term memory, which, according to the July 2010 IEP, was the reason for recommending speech-language therapy for the student (see Dist. Exs. 11 at p. 2; 15 at p. 12; 17 at p. 10). At the July 2010 CSE meeting, the audiologist stated that speech therapists typically provided the type of therapy she recommended in her evaluation report (see Parent Ex. DDDDD at p. 9).

[33] In the memorandum of law, the parent also referred to the 1:1 pull-out speech-language therapy sessions as part of her argument regarding the restrictive nature of the student's 2010-11 program (see Parent Mem. of Law at p. 9). However, the student's finalized 2010-11 IEP did not include a recommendation for 1:1 speech-language therapy services, but rather, recommended one session of speech-language therapy in a small group (3:1) per six-day cycle (i.e., one session of speech-language therapy every six days) (see Dist. Ex. 11 at p. 2).

evidence reveals—as properly noted by the IHO in the decision—that the district recommended the daily 1:1 tutorial, the daily 1:1 reading instruction, and the small group speech-language therapy services to provide the student with additional structural supports as she transitioned into the less restrictive inclusion class in the district (see IHO Decision at pp. 44). Therefore, although the student would receive the daily 1:1 tutorial, the daily 1:1 reading instruction, and the small group speech-language therapy services separate from her nondisabled peers, that fact, alone, is insufficient to establish that the student's overall program recommended in the 2010-11 IEP constitutes a violation of the LRE or that that it would deprive the student of a FAPE.

4. The District Failed to Address the Student's Social/Emotional Needs Transitioning into a Public School Program.

Lastly, the parent argues in her memorandum of law that the district failed to address the student's social/emotional needs for the 2010-11 school year and relies primarily upon the information contained in the IEE evaluation report to support her position (see Parent Mem. of Law at pp. 11-12). Notably, however, and as previously discussed, the CSE did not have an opportunity to review and consider the IEE evaluation report until September 17, 2010—after the parent had already rejected the student's 2010-11 IEP and program on August 23, 2010 (see Parent Exs. GG at p. 1; Ex. CCCCC at p. 1-37). However, prior to the rejection of the student's 2010-11 IEP, the district had convened three CSE meetings to develop the student's IEP, and according to the evidence, the evaluative data considered at these meetings did not indicate concerns regarding the student's social/emotional status (see Dist. Exs. 14-20). Notably, the 2010 neuropsychological evaluation report indicated that the student exhibited "no significant difficulties with emotional and psychosocial adjustment" and at that time, the student presented as a "confident young lady" (Dist. Ex. 18 at p. 5). At the June 24 and July 23, 2010 CSE meetings, the participants discussed the student's social/emotional needs in the context of her transitioning to a less restrictive program in the district, and considered whether the CSE should recommend counseling as a related service in the student's 2010-11 IEP (see Parent Exs. DDDDD at pp. 17-23, 38-44; KKKKK at pp. 42-46, 48-50, 84-89). Toward the conclusion of the June 24, 2010 CSE meeting, the district's school psychologist stated that counseling or psychological services would be available to the student should she demonstrate a need for those services upon her return to the district (see Parent Ex. KKKKK at p. 84). At the July 2010 CSE meeting, the CSE chairperson stated her initial impression that the student would benefit from counseling to assist in her transition to the public school (see Parent Ex. DDDDD at p. 38). Later in the same meeting, the district's school psychologist expressed his concern that counseling services may be more stigmatizing to the student and that the CSE may be underestimating the student's ability to adapt to the transition to the district (see id. at pp. 39, 42-44). The July 2010 CSE meeting concluded without adding counseling as a related service to the student's IEP (see Dist. Ex. 11 at pp. 1-2; Parent Ex. DDDDD at pp. 44-52). Thus, the hearing record supports a finding that during the development of the student's 2010-11 IEP, the 2010 CSEs were aware of the student's social/emotional needs surrounding her potential return to the district, discussed whether to add counseling as a related service to the student's IEP—and was prepared to recommend, if necessary, specific services such as counseling to address those needs—and further, that the district offered a special education program designed to support her academic needs and reduce the effect of transitioning from Landmark with the additional daily 1:1 tutorial, daily 1:1 reading instruction, and small group speech-language therapy services (see Dist. Ex. 11 at pp. 1-3).

As stated previously, the district received the IEE evaluator's report on August 17, 2010, and shortly thereafter, the parent's notice of unilateral placement on August 23, 2010 (see Dist. Exs. 21 at pp. 1-11; 47-48; Parent Ex. GG at). The CSE convened on September 17, 2010, after the student had begun the school year at Landmark, to review the IEE and discuss the findings with the IEE evaluator (see Parent Ex. CCCCC at pp. 1-37). A review of the IEE evaluation report and the discussion of his findings at the September 2010 CSE meeting supports the IHO's determination regarding the speculative nature of the IEE evaluator's concerns about the student's emotional state should she return to the district (see Dist. Ex. 21 at pp. 1-11; Parent Ex. CCCCC; IHO Decision at pp. 39-42). In addition, the hearing record demonstrates that the student's 2010-11 IEP recommended various services (consultant teacher direct services, a daily 1:1 tutorial and daily 1:1 reading services, speech-language therapy, program modifications, and testing accommodations) to reduce or eliminate situations where the student perceived "academic challenges" as "insurmountable" (Dist. Exs. 11 at pp. 1-3; 21 at pp. 7-8). In addition, as the IHO properly noted in her decision, the IEE evaluation report also included recommendations directed at the student's teachers and service providers to further assist the student's perceptions about the academic challenges she faced and to minimize these situations, which could all be provided within a public school setting (see Dist. Ex. 21 at pp. 7-8; IHO Decision at pp. 39-42, 44-45). Additionally, the hearing record demonstrates that the IEE evaluator's recommendation for individual psychotherapy was not a service typically provided within the public school setting (see Parent Ex. CCCCC at p. 13).

VII. Conclusion

Based upon the foregoing therefore, I agree with and find no reason to disturb the IHO's determinations that the district offered the student a FAPE in the LRE for the 2009-10 and 2010-11 school years, and the parent's petition must be dismissed. Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2009-10 and 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Landmark was an appropriate placement (Burlington, 471 U.S. at 370).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 22, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER